84-45

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DOLORES E. MOE, ERIC R. MOE, KRIS L. MOE AND LEIF A. MOE; JUDY ELAINE RENZELMAN, INDIVIDUALLY, AND AS CONSERVATOR AND NEXT FRIEND OF MINOR BRAD ALLEN RENZELMAN; ELAINE L. WHISTLER, PAUL W. WHISTLER, DIANE WHISTLER AWALT; JOAN ELAINE ANDERSON, INDIVIDUALLY, AND AS GUARDIAN AD LITEM AND NEXT FRIEND OF MINORS ELIZABETH JOAN ANDERSON AND CHRISTOPHER ANDREW ANDERSON; BEVERLY L. MILES; AND THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A COLORADO CORPORATION,

Petitioners,

v.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, FALCON JET CORPORATION, AND THE GARRETT CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

L. B. ULLSTROM, Esq.
ROBERT P. SMITH, Esq.
LAW OFFICES OF
L. B. Ullstrom
601 Broadway, Suite 400
Denver, Colorado 80203
(303) 292-3880
Attorneys for Petitioners

QUESTIONS PRESENTED

I. WHETHER THE FEDERAL RULES OF EVIDENCE RULES 403 AND 401 WERE IMPROPERLY USED TO OVERRULE SUBSTANTIVE COLORADO STATE LAW AND POLICY.

II. WHETHER FEDERAL RULES OF EVIDENCE RULE 407 WAS WRONGLY APPLIED BY THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND WAS APPLIED IN A MANNER INCONSISTENT WITH PRIOR TENTH CIRCUIT DECISIONS.

III. WHETHER FEDERAL RULES OF CIVIL PROCEDURE RULE 42(b) WAS WRONGLY INVOKED TO BIFURCATE THE TRIAL.

IV. WHETHER THE APPELLATE COURT FAILED TO APPLY AS ITS RULE OF DECISION THE SUBSTANTIVE COLORADO STATE LAW AND POLICY APPLICABLE TO THE CASE.

V. WHETHER FEDERAL RULES OF CIVIL PROCEDURE RULE 51 PRECLUDES REVIEW OF JURY INSTRUCTIONS WHICH MISSTATE THE LAW OF THE CASE AND WHETHER RULE 46 SHOULD BE READ IN CONJUNCTION WITH RULE 51 BEFORE PRECLUDING REVIEW.

VI. WHETHER ANY TESTIMONY BY AN EMPLOYEE OF THE NATIONAL TRANSPORTATION SAFETY BOARD CONCERNING THE CAUSE OF AN ACCIDENT IS ADMISSIBLE EVIDENCE PURSUANT TO THE FEDERAL AVIATION ACT OF 1958 AND APPLICABLE FEDERAL REGULATIONS.

LIST OF PARTIES

The names of all parties to this action are included in the caption.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Dolores E. Moe, et al., petitioners herein, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on January 30, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, affirming the trial court, was filed on January 30, 1984 (Appendix A) and is reported as: *Moe* v. *Avions Marcel Dassault-Breguet Aviation*, 727 F.2d 917 (10th Cir. 1984). The judgment of the United States District Court for the District of Colorado, ordering that judgment be entered in favor of the defendants and against the plaintiffs, was filed on December 11, 1981 (Appendix B) and was not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on January 30, 1984. A timely petition for rehearing was denied on April 2, 1984 (Appendix C). (Supreme Court Rule 20.4.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

RULES, STATUTES AND REGULATIONS INVOLVED

The following rules, statutes and regulations are involved and are attached as Appendices D through K.

> Federal Rules of Evidence, Rules 401, 403 and 407.
>
> Federal Rules of Civil Procedure, Rules 42(b), 46 and 51.
>
> The Federal Aviation Act of 1958, 49 U.S.C. § 1441(e).
>
> Code of Federal Regulations, 49 C.F.R. § 835.3 (1981).

STATEMENT OF THE CASE

A summary of the facts, consistent with the meaningful findings but with some details withheld for presentation in connection with the reasons set forth for granting the writ, is as follows:

A Falcon 10 twin-engine business jet was reported on radio by the pilots as "out-of-control" and crashed at 4:52 a.m., ten minutes after take-off from Stapleton International Airport, Denver, Colorado, on April 3, 1977. The pilot and co-pilot were killed. Two passengers were also killed. The remaining passenger was left a paraplegic. The aircraft was totally destroyed. (*See:* Appendix X.)

The Falcon 10 is a business jet designed and manufactured by Defendant Avions Marcel Dassault (AMD) in France and is marketed in the United States by Defendant Falcon Jet Corporation (Falcon Jet). Falcon Jet also supplies maintenance support to operators. The aircraft was equipped with two turbofan jet engines designed and manufactured by Defendant Garrett Corporation (Garrett).

The jet was owned and operated by Plaintiff Mountain States Telephone and Telegraph Company (Mountain Bell). The pilot, Kenneth Moe, and the co-pilot, Rodney Renzelman, were employees of Mountain Bell. Passengers Douglas Whistler, Andrew Anderson, and Beverly Miles were also Mountain Bell employees but were not acting within the scope of their employment at the time of the crash. Beverly Miles, the lone survivor, suffered permanent, paralyzing injuries.

The plaintiffs' Complaint, filed in the United States District Court for the District of Colorado on March 30, 1979, sought damages for wrongful death, personal injuries, and property damage. The claims were based on negligence and strict product liability. Jurisdiction was based on diversity of citizenship pursuant to 28 U.S.C. § 1332. The Complaint was

amended on February 25, 1980 to include a claim for exemplary damages on behalf of Beverly Miles. This claim was dismissed on April 10, 1980 pursuant to the court's ruling that a claim for punitive damages brought more than one year after the occurrence of the injury was barred by Colorado statute.

The trial court, over objection by the plaintiffs, ordered bifurcation of the trial. The issue of liability was, therefore, heard first with a separate trial on the issue of damages to be held later if necessary.

The plaintiffs' theory of the case was that the Falcon 10 flight control system, complex and containing unusual design features, was defective. They asserted that the probable cause for the Falcon 10 going out of control was a combination of one or more problems in the flight control system, inclusive of the hydraulic system, the artificial feel system (Arthur Q), and the autopilot.

The Arthur Q is an artificial feel system which stiffens the flight controls to limit control surface movement at high speeds to prevent overstressing the aircraft. When the Arthur Q runs away to high mode, the controls stiffen (much as an automobile with power steering when the engine turns off). The pilot cannot then return the Arthur Q from high mode while in flight. The Falcon 10 had an Arthur Q system which had a propensity to runaway to the high position. Falcon 10 jets had a history of Arthur Q runaways. There was evidence that the subject Falcon 10 had an Arthur Q runaway on its last flight.

The Falcon 10 also had a history of hydraulic problems. The crew of the subject aircraft radioed, "no hydraulics." An emergency hydraulic switch was found in the "on" position in the post-crash wreckage. Incidents of clogging of the filters in the Falcon 10 hydraulic system had been reported. The crew on this flight radioed, "out of control" and "no hydraulics . . . no control." (Appendix X.)

The most insidiously dangerous system on the Falcon 10 is the autopilot. If a pilot attempts to disengage the autopilot, but it remains engaged, and the pilot then manually moves the flight controls, the autopilot causes the airplane to respond opposite to the pilot's control inputs. The trim will be driven to full nose up, and the pilot runs out of down movement of the elevator control, sufficient to keep the airplane from stalling, and a bank and turn is immediately required to avoid a stall and spin. There is no clear visual indication or aural warning of whether the autopilot is engaged or disengaged in a Falcon 10 jet. But the real danger of the Falcon 10 control system occurs when one failure combines with another. Either the stiffness of Arthur Q runaway or the hydraulic clogging can camouflage the fact that the aircraft is flying with the autopilot engaged.

Plaintiffs claimed that the failure of the flight control system and the subsequent loss of engine power were the ultimate causes of the crash. The defendants claimed that the cause of the accident was the crew attempting to fly the aircraft while the autopilot was engaged. Both the pilot and the co-pilot were highly experienced in flying the Falcon 10.

Throughout the pre-trial and trial phases of this litigation, the court erroneously indicated that it considered a claim for *negligence* to be the *same as* a claim for *strict liability*. This position was continuously reflected in its rulings on evidentiary issues.

The trial court denied admission of plaintiffs' Exhibit 19, "Newsflash 16", a post-accident document released by Defendant AMD to indicate that a failure of the autopilot to disengage presented an "insidious" danger. The document was denied admittance as direct evidence on the issue of failure to warn, pursuant to Fed. R. Evid. 407, 403 and 401, as well as for purposes of impeachment and rebuttal. As to the latter issues, the judge ruled that plaintiffs' counsel was permitted to "paraphrase" the language of "Newsflash 16" on cross-examination and that this was sufficient to fulfill the

requirements of the impeachment exception contained in Rule 407.

Evidence of a remarkably similar incident, in which the pilot survived to explain the immediately catastrophic problems which arise when a Falcon 10 autopilot fails to disengage, as well as the difficulties of perceiving whether the autopilot remained engaged despite attempted disengagement, was excluded under Rule 403. Additionally, evidence of 47 incidents of Falcon Jet Arthur Q runaway problems, both pre-crash and post-crash, and evidence of 23 incidents of hydraulic problems in the Falcon 10 was denied admittance as direct evidence as well as for impeachment or rebuttal.

The trial lasted 26 days. After being erroneously instructed that the contributory negligence of Mountain Bell or of the pilots would bar recovery to the passenger plaintiffs, the jury returned general verdicts relating to the strict liability and tort claims in favor of the defendants. The jury answered interrogatories relating to the negligence claims to the effect that the negligence of none of the parties proximately caused the crash, although Mountain Bell was found non-causally negligent.

Thus were the widows of the two dead passengers denied recovery from these defendants. The surviving paraplegic passenger recovered nothing from these defendants. The widows of the pilots received nothing from these defendants. This erroneous result is not unlike that which could happen as a result of a crash on any airline in this country. The Tenth Circuit affirmed the district court in all respects, overlooking not only established points of federal and state law, but its own prior decisions as well.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Justice has miscarried in this case.

If allowed to stand, this case holds at risk all future airline passengers to the charge that passengers have the same knowledge as the pilot crew, as to defects in the aircraft allegedly known by the pilots. Negligence of the pilots was imputed to the passengers by an erroneous jury instruction supplied by defendants.

In cases such as this, with millions of dollars at risk, it has now become impossible for a practicing attorney to advise his client, with any degree of certainty or predictability, as to the outcome of a potential lawsuit. An attorney and his client are asked to risk millions of dollars without having a clear idea of how, or why, a particular judge will rule on crucial evidentiary issues. Adequate criteria by which to gauge the exercise of judicial discretion simply do not exist.

Even though the defendants agreed that the aircraft went out of control and the autopilot caused the crash, a female passenger, made paraplegic by the crash, and widows of 2 passengers, all innocent of knowledge, have been improperly, legally saddled with the same alleged knowledge of the pilots, of a defect in the autopilot disengage system (via an affirmative defense) and thus denied recovery from these defendants.

By the questionable use of Rule 403, the trial judge avoided complying with Colorado law in reference to Rule 407, and excluded vital evidence. The trial court, Chief Judge Sherman Finesilver, even though noting that all parties agreed the autopilot caused the crash, improperly and arbitrarily excluded numerous items of vital evidence, from the jury, *bearing on the cause of the crash*, offered by the plaintiffs, then in classic circular reasoning, the Tenth Circuit held that the plaintiffs had failed to convince the jury *of causation*.

The Tenth Circuit also identified errors of law in jury instructions supplied by the defendants, but because of the non-finding of causation by the jury, ruled the errors not prejudicial, thus compounding the effect of the erroneous exclusion of evidence ruling which precluded the jury from finding causation.

Justice in the Denver U.S. District Court, with respect to punitive damages, depends upon the luck of the draw; with Chief Judge Finesilver ruling one way on the statute of limitations, and two other judges in 3 cases following the Colorado decided case law, ruling the other way. The Tenth Circuit avoided settling the issue.

This opinion of the Tenth Circuit contradicts other circuits relative to the application of Fed. R. Evid. Rules 407 and 403 as well as on the issue of refusing to adequately review erroneous jury instructions for an alleged failure to object. The trial, moreover, was wrongly bifurcated, violating criteria set by this Court.

The Tenth Circuit failed to follow Colorado law on affirmative defenses, impeachment, rebuttal, and punitive damages. This is a violation of Supreme Court case law and federal statute.

Additionally, the Tenth Circuit glossed over and upheld an erroneous lower court ruling in spite of its own ruling that NTSB testimony as to cause is not admissible at trial. This is a violation of federal statute and regulation.

I. Uniform Standards Are Necessary And Can Only Be Set By This Court.

The erroneous application of Rule 403 was the hinge point of this trial, and the trial court's erroneous subjective determination of what was "unfair" in the "unfair prejudice" phrase of Rule 403 moved this case from a plaintiff's win to a defense verdict.

This case manifests a need for standardized guidelines in the application of Fed. R. Evid. Rules 401, 403, 407, and Fed.

R. Civ. P. Rule 42(b). The scope of trial court discretion in these areas is so broad that even though the Tenth Circuit identified clear errors of the lower court, it affirmed the lower court's erroneous exercise of discretion. The Tenth Circuit ruled that the plaintiffs were not prejudiced by crucial evidentiary exclusions because the jury had failed to find causation, ironically ignoring the claim that the causal link would have been found if the excluded evidence had been admitted.

A party who is thus unfairly prejudiced by a trial judge's ruling is virtually without the remedy of review. The trial judge retains unbridled, unreviewable discretion. Standards and guidelines are needed by which to gauge adequate appellate review. This Court can now insure the uniform application of these rules and establish criteria for review by setting forth the applicable tests. These matters are "special and important" to all litigants in our federal courts. (Supreme Court Rule 17.1.); *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 79 (1955); *United States* v. *Constantine*, 296 U.S. 287, 290 (1935).

A. Three examples from this case of the need for standards in the federal rules of evidence.

1. Frequently the cause of an aircraft accident is difficult to prove, due to the loss of the pilots and fragmentation of the crashed aircraft; circumstantial evidence is needed to prove causation, thus rendering evidentiary rulings crucial at trial. Excluded from the jury was the offer of proof testimony of a pilot who, on April 15, 1981, while flying a Falcon 10 jet, experienced an autopilot, non-perception of a non-disengagement emergency, identical to that involved in the Mountain Bell crash. This was known as the McGraw-Edison Incident. Unlike the Mountain Bell crash, the engines did not fail and the McGraw-Edison pilot survived. His testimony was relevant to the issue of causation vis-a-vis pilot non-perception of the non-disengagement of the autopilot. The appellate court sustained the trial court's denial of admission of evidence of the McGraw-Edison Incident under Rule 403 on the ground

that acceptance of the evidence would involve a "mini-trial", although all the depositions had been taken on the matter. 727 F.2d at 935 (Appendix A-36).

2. The trial court further excluded from evidence Falcon Jet Field Service Reports and Customer Contact Reports describing 47 Arthur Q runaway incidents and 23 incidents of hydraulic failure, which were vital to the plaintiffs' theories of the case. The reports described customer complaints of numerous incidents of previous malfunctions of the Arthur Q and the hydraulic systems, reported and acted upon by Falcon Jet Corporation. The appellate court upheld the trial court's exclusion of this relevant evidence pursuant to Rule 403 for lack of "prejudicial error." 727 F.2d at 935 (Appendix A-35).

3. Also excluded was a manufacturer's post-accident warning which was directly on point. Exhibit 19 consisted of two parts, the autopilot manufacturer, Collins Avionics, Service Information Letter #1-77 dated September 30, 1977 describing difficulty in autopilot disengagement, and procedures to lubricate solenoid plungers to make it easier to disengage the autopilot; and Service Newsflash 16, issued by AMD March 1, 1978, describing how non-perception of autopilot non-engagement is an "insidious failure" which could lead to a horizontal trim runaway. The exhibit demonstrated that Defendant AMD had knowledge of this "insidious failure" for five months (via Collins Information Letter) before issuing Service Newsflash 16. "Newsflash 16" (Appendix L) was offered by the plaintiffs as evidence of the need for a warning regarding the "insidious" danger presented by the autopilot. Newsflash 16 was also offered for purposes of impeachment and rebuttal of negligence. The trial court applied Fed. R. Evid. 407 to this strict product liability action and denied admission of the evidence as direct evidence, as well as for impeachment or rebuttal. While the appellate court ruled that the district court had erred in not applying Colorado law in the application of Rule 407, which would

have made the document admissible, nevertheless, the appellate court sustained the erroneous ruling of the judge on the ground that the trial court had also excluded the evidence pursuant to Rule 403 and Rule 401. 727 F.2d at 931, 933, 934 (Appendix A-27, 28, 31, 32, 34).

In essence, Rule 403 controlled this case, contradicting the law of Colorado decided cases. The Tenth Circuit affirmed the Rule 403 conclusions of the trial court without inquiry into the specific factors considered or weight assigned by the trial court relative to potential unfair prejudice or jury confusion because none were cited by the trial court. The unfair prejudice resulting from these evidentiary exclusions and the inadequacy of appellate review are highlighted at page 926 of the Tenth Circuit's opinion (727 F.2d at 926; Appendix A-16) where the appellate court found that if the jury instructions were erroneous, they were harmless because the jury failed to find causal negligence on the part of the defendants. But the erroneous, prejudicial evidentiary exclusions *precluded* the jurors from finding causation.

The Tenth Circuit stated that Newsflash 16 was admissible under Rule 407, in accordance with Colorado decided cases. If the trial court had correctly ruled that Newsflash 16 was admissible pursuant to state law underlying the application of Rule 407, as held by the Tenth Circuit, it should not have used Rule 403 to exclude the evidence. The resort to Rule 403 was improper. The trial court had no discretion to exclude the evidence which Colorado law holds admissible.

The exercise of discretion under Rule 403 is "practically unreviewable." Weinstein and Berger, *Basic Rules of Relevancy in the Proposed Federal Rules of Evidence*, 4 Ga.L.Rev. 43, 79 (1969). Because of this broad grant of judicial power, Rule 403 should be applied "infrequently and cautiously by trial judges." *Id.* at 86.

The mere fact that certain evidence "prejudices" the adversary's case is not a sufficient objection; the prejudice must be *unfair* for some *specific reason*. Bertelsman, *What*

You Think You Know (But Probably Don't) About the Federal Rules of Evidence; A Little Knowledge Can Be a Dangerous Thing, 8 N.Ky.L.Rev. 81, 87 (1981). Evidence does not become unfairly prejudicial by hurting the case of the side opposing its admission; the evidence must appeal to irrationality or emotion. Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 So.Calif.L.Rev. 220, 238 (1976).

In order for the balancing test of Rule 403 to be invoked there must be a "significant tipping of the scales" in favor of exclusion of the evidence and against its probative worth. *United States* v. *Davis*, 639 F.2d 239, 244 (5th Cir. 1981). It has thus been said:

> The phrasing of Rule 403 makes it clear that the discretion to exclude does not arise when the balance between the probative worth and the countervailing factors is debatable; there must be a significant tipping of the scales against the evidentiary worth of the proferred evidence. Thus, *the appellate court need not find that the trial court abused his discretion; it is enough that he erred in concluding that he had any discretion.*

22 C. Wright and K. Graham, *Federal Practice and Procedure: Evidence* § 5221 at 309-10 (1978) (emphasis supplied).

The trial judge wrongly resorted to the use of Rule 403 in excluding Newsflash 16. The appellate court overlooked this error in upholding the trial court's exercise of discretion when, in fact, *the judge did not have discretion* under these circumstances. It is a *misuse* of Rule 403 for an appellate court to acknowledge that a trial court *may have erred* in excluding evidence under a given rule, but since the evidence could have been excluded under Rule 403 anyway, the appellate court will overlook the error. 22 C. Wright and K. Graham, *supra*, at § 5223. This Court, therefore, should issue guidelines preventing an appellate court from resorting to the "catch-all" rule of 403 to justify the exclusion of evidence rightfully admissible under state law.

The trial judge sought to bolster his 403 ruling with Rule 401, saying, "The relevance and probative value of the subsequent measures taken in this action are low, Rule 401." (Appendix M). The appellate court, curiously enough, found this statement significant in sustaining the judge's ruling. 727 F.2d at 934 (Appendix A-33). The Tenth Circuit thus revealed its uncritical and cursory acceptance of the judge's conclusions by allowing Rule 401 to be used to exclude clearly relevant, probative and critical evidence. The Newsflash 16 evidence was clearly "relevant" under Rule 401. The judge, however, did not explain why the *defendants' own description* in Newsflash 16 of an "insidious failure" of the autopilot did not have "any tendency to make the existence of any fact . . . more or less probable." *See*: Rule 401. The failure of the autopilot depicted by Defendant AMD in Newsflash 16 went directly to the plaintiffs' theory of the case and followed the similar incident described by the McGraw-Edison pilot. Yet the appellate court refused to review the judge's exercise of discretion and uncritically accepted the judge's statement as to relevance. Thus, both Rule 401 and Rule 403 were misused in a manner to exclude relevant evidence admissible under Colorado law.

No ascertainable standards exist as to when and how Rule 403 is to be implemented, how Rule 401 equates to Rule 403, or whether Rule 403 can uncritically override any other rule. Appellate court deference to lower court discretion effectively precludes review of erroneous rulings. Furthermore, this case holds that Rule 403 can be used to override Colorado state *substantive law and policy*. These issues have not heretofore been addressed by this Court.

B. The need for standards in the application of Fed. R. Civ. P. 42(b), with reference to bifurcation of trials.

The exercise of discretion under Fed. R. Civ. P. 42(b) is unreviewable for lack of established guidelines relative to its application. Rule 42(b) provides the trial judge with the discretion to order separate trials "in furtherance of convenience

or to avoid prejudice, or when separate trials will be conducive to expedition and economy, . . ." All plaintiffs in this case objected to bifurcation of the trial, contending that the purposes of the rule would not be served by separating the liability and damages issues. The appellate court failed to consider whether *any discretion* to order separate trials was available to the trial judge in the first instance. 727 F.2d at 935 (Appendix A-36).

Whether personal injury suits should be divided into separate trials, considering liability first and then damages, is a subject of considerable debate. 9 C. Wright and A. Miller, *Federal Practice and Procedure*: Civil § 2390 (1971). The separation of issues is not to be ordered routinely. *Id.*; *Notes of Advisory Committee on Rules* (1966 Amendment). State law has no bearing on bifurcation in a diversity case. *Moss* v. *Associated Transport, Inc.*, 344 F.2d 23 (6th Cir. 1965). This is a national issue warranting uniform standards.

The initial decision to bifurcate this trial conflicts with the ruling of this Court in *Gasoline Products, Inc.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931). *Gasoline Products* stands for the principle that a trial cannot be bifurcated if the issues are so intertwined that to try the issues separately would cause confusion and uncertainty, resulting in the denial of a fair trial. 283 U.S. at 498.

The standard announced in *Gasoline Products* has been applied to the analogous situation of a pre-trial decision on bifurcation. *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302 (9th Cir. 1961), *cert. denied*, 366 U.S. 924 (1961). United Air Lines objected to the severance of the issues, and the appellate court relied on the *Gasoline Products* standard in ruling that the damage and liability issues involving the airplane accident were too interrelated to be heard separately without injustice. 286 F.2d at 306.

In the case under review the liability and damage issues are so intertwined that the two could not be tried separately without destroying the plaintiffs' right to a fair trial. The

issue of the plaintiffs' damages, especially as to Beverly Miles, is so intertwined with the facts and circumstances surrounding the cause of the accident, going to the issue of liability, that the ordering of separate trials was neither efficient nor fair.

Heckman v. *Federal Press Co.*, 587 F.2d 612 (3rd Cir. 1978), was a product liability case in which the defendant manufacturer appealed on a damages issue. The appellate court remanded the case for a new trial, relying on *Gasoline Products* to conclude that more than the damages issue would have to be re-tried because the issues were too interwoven to be tried separately.

If the trial court had correctly allowed the punitive damages claim of Beverly Miles (discussed *infra*, Reason III), pursuant to Colorado law, the bifurcation order would certainly have been flawed, for the conduct giving rise to the damages would in itself be the measure of damages. Cases holding that the *Gasoline Products* standard is violated when a court bifurcates a trial involving punitive damages include: *Slater* v. *KFC Corporation*, 621 F.2d 932 (8th Cir. 1980); *Atlantic Coastline Railroad Company* v. *Bennet*, 251 F.2d 934 (4th Cir. 1950).

The court's decision on bifurcation resulted in the 6 person jury growing to 12 jurors, so that if illness resulted, the subsequent damages trial would be heard, by at least six of the same jurors.

The plaintiffs were further prejudiced by the fact that the jurors had been told by the court that the liability phase of this trial could take five weeks. Then, the same jurors would be called back in a month or two to determine damages. Such inconvenience presented to the jurors could only promote an attitude of "let's get this over with." After five weeks of trial, knowledge by the jury that any finding of negligence on the part of any defendant would automatically force these twelve citizens, at some unknown future date, to

spend more weeks listening to damage testimony, subtly affected the jurors.

Petitioners contend that the court's ruling encouraged a finding of "cause unknown", or no liability. The trial court refused the plaintiffs' request to interview the jury, which request for judicial permission is required by the local rules of court.

The Tenth Circuit disposed of this issue in one sentence, finding simply that the plaintiffs were not prejudiced by the bifurcation of this trial. 727 F.2d at 935 (Appendix A-36). The court did not follow *Gasoline Products* or interpretive cases, despite the objections of all plaintiffs. (Supreme Court Rule 17.1(c).)

II. The Court Of Appeals For The Tenth Circuit Has Decided Important Questions Of Federal Law Which Have Not Been, But Should Be, Settled By This Court.

The Tenth Circuit decided important questions of federal law which should be resolved by this Court. (Supreme Court Rule 17.1(c).); *Brown Transport Corp.* v. *Atcon, Inc.*, 439 U.S. 1014, 1021 (1978) (White, J., dissenting). Moreover, the Tenth Circuit decided this case in a manner inconsistent among the panels of the appellate court itself.

A. Federal questions decided by the appellate court.

1. The Tenth Circuit ruled that the admissibility of evidence in diversity actions is not governed exclusively by federal law. 727 F.2d at 931 (Appendix A-28). In a diversity based product liability case, state evidentiary law should be applied to determine the admissibility of evidence of subsequent remedial measures. *Id.*

2. The Tenth Circuit ruled that, where state courts have interpreted Rule 407 or its equivalent state counterpart rule, the question of whether subsequent remedial measures are excluded from evidence is a matter of *state policy*. 727 F.2d at 932 (Appendix A-29). When there is a conflict between Rule 407 and a state rule, *the state rule controls*

because Rule 407 is founded upon policy considerations rather than relevancy or truth seeking. *Id.*

The trial court had erroneously ruled that Rule 407 was not governed by or made applicable by state law. The appellate court pointed out this error. 727 F.2d at 931, 933 (Appendix A-28,31). The appellate court acknowledged that Colorado Rule of Evidence 407, identical to the federal rule, was intended to *exempt strict liability* actions from the application of the rule. *Id.*

Furthermore, the Tenth Circuit ruled that the holdings of *Good* v. *A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977), and *Roberts* v. *May*, 41 Colo. App. 82, 583 P.2d 305 (1978), were controlling in this case and would have permitted the admission of Newsflash 16 under Colorado state substantive law. 727 F.2d at 933 (Appendix A-33).

Nonetheless, because the trial judge claimed he had performed a "balancing test", the appellate court affirmed the district court in ignoring state policy and excluding the evidence pursuant to Federal Rule 403. No balancing of criteria, ascertainable by others, appears in the record. 727 F.2d at 934 (Appendix A-33).

Thus, Colorado state policy underlying the application of Rule 407, which the Tenth Circuit said *was controlling*, was *not* controlling, and became moot because of the trial court's assertion of the mental "balancing" scenario.

3. The Tenth Circuit defined the purpose of Rule 407 as follows: "The purpose of Rule 407 is not to seek the truth or to expedite trial proceedings; rather, in our view, it is one designed to *promote state policy* in a substantive law area." 727 F.2d at 932 (Appendix A-29). It has been said that Rule 403 is concerned with the "search for truth." Weinstein and Berger, *supra*, at 86. While stating that the purpose of Rule 407 is not to seek the truth or to expedite the proceedings, the Tenth Circuit allowed Rule 403 to override Rule 407 and, consequently, Colorado state policy. Since the underlying policy concerns of the respective rules are not the same, it

is erroneous to uncritically allow the purpose of one, Rule 403, to overrule the purpose of the other, Rule 407.

4. Fed. R. Evid. 407, precluding the admission of evidence of subsequent remedial measures, contains an "impeachment" exception. Exhibit 19 was offered to impeach the defense witnesses who testified that any alert and careful pilot would have perceived that the autopilot had remained engaged after attempted disengagement, thereby implying pilot misuse or negligence, exactly contrary to the "insidious failure" language of the Exhibit. The Tenth Circuit ruled that a mere "paraphrase" of the proffered evidence satisfies this impeachment exception and that the actual evidence — Exhibit 19 — Newsflash 16 — may be excluded when offered for impeachment or rebuttal. 727 F.2d at 934, 935 (Appendix A-34, 35). There is total absence of legal authority mustered by the Tenth Circuit to support the proposition that a mere "paraphrase" may substitute for the admission of impeachment evidence under the Rule 407 impeachment exception. The Tenth Circuit cited no cases for this novel evidentiary ruling.

B. Conflict among the panels of the Tenth Circuit.

1. The appellate court took special note of the trial court's belief that Newsflash 16 should not be admitted because the case was being tried on a negligence as well as a strict liability theory. 727 F.2d at 931, 934 (Appendix A-27,33). Yet in a similar situation the Tenth Circuit ruled that a limiting instruction should be given and that evidence inadmissible under Rule 407 as to negligence should still be admitted as to the strict liability issues. *Herndon* v. *Seven Bar Flying Service, Inc.*, 716 F.2d 1322, 1330 (10th Cir. 1983), *cert. denied*, ____ U.S. ____ (April 30, 1984).

2. The Tenth Circuit's opinion under review also contradicts *Herndon* on the question of the meaning of "controverted" within the context of Rule 407. In *Herndon*, the court adopted the rationale that, in cases involving both negligence

and product liability, the feasibility of precautionary measures *would be deemed* "controverted" unless *the defendant made an unequivocal admission of feasibility* so the *jury* could understand. 716 F.2d at 1329.

This test was not met in the present case. Rather, the appellate court accepted the defendants' assertion, not made known to the jury but merely part of a trial brief, that the "feasibility of warning . . . was not controverted." 727 F.2d at 934 (Appendix A-33); Reply Brief for Defendant AMD at 27 (Appendix N). The trial judge had, in fact, sought unsuccessfully to require "a stipulation as to the feasibility of precautionary measures" in order to avoid the issue. (Appendix O.) Such a stipulation does not appear in the record in this case. Supreme Court guidance as to the "feasibility exception" of Rule 407 is needed.

3. Two weeks *prior* to the decision in the present case, the Tenth Circuit decided another Colorado strict product liability case, ruling that evidence of subsequent remedial measures admissible pursuant to Rule 407 would not be excluded as unfairly prejudicial under Rule 403 because any tendency toward prejudice was eliminated by the court's instruction to the jury to consider the evidence only with respect to the *feasibility of alternatives*. *Meller* v. *The Heil Company*, Nos. 82-1858 and 82-1883 (10th Cir. Jan. 16, 1984), slip op. at 8. Evidence admissible for a Rule 407 purpose would not be excluded by Rule 403. *Meller*, slip. op. at 6. As to feasibility, the court noted that feasibility will almost always be questioned in design defect cases. *Meller*, slip. op. at 6, n. 7. The court reaffirmed its "unequivocal admission" requirement of *Herndon*. *Id.*

4. In *Rimkus* v. *Northwest Colorado Ski Corporation*, 706 F.2d 1060, 1064, 1066 (10th Cir. 1983), a negligence case, the Tenth Circuit ruled evidence of subsequent measures admissible to counter a defendant's claim of contributory negligence. That result and reasoning in the present case would have admitted Newsflash 16. The defendants claimed that alert and careful pilots would have perceived that the

autopilot had not disengaged, thus they were careless. In *Rimkus*, at 1066, Judge Doyle stated:

> Rule 407 prohibits the admission of evidence of subsequent repairs when that evidence is introduced for the purpose of proving negligence of the defendant. Where *it relates to the alleged contributory negligence of plaintiff it should not be considered prejudicial. Indeed, where any other purpose exists the jury should be allowed to hear and consider the evidence.* Advisory Committee's Notes, quoted in 2 Wigmore on Evidence, 283(4) (1979) at 181. Case such as the one at bar present a recognized difficulty in applying Rule 407: "[T]he feasibility of a precaution may bear on whether it was negligent not to have taken the precaution; thus negligence and feasibility are often not distinct issues." *Weinstein, supra*, at 407-18. (Emphasis supplied.)

There are no essential factual differences among *Herndon, Meller, Rimkus*, and the present case. The U.S. Supreme Court recently denied certiorari in the *Herndon* case. If the principles espoused in *Herndon, Rimkus* or in *Meller*, had been followed in the present circumstance, Newsflash 16 would have been admitted. In affirming the trial court, the appellate court has applied inconsistent and now confusing rules of law relative to important federal questions not heretofore determined by this Court.

III. The Appellate Court Failed To Apply Colorado Substantive Law As Its Rule Of Decision.

The Tenth Circuit failed to apply as its rule of decision the law of the state whose law was applicable to the case. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). *See also*: 28 U.S.C. §1652. This violation of case law and statute occurred in the areas of affirmative defenses (assumption of risk and product misuse) under Colorado law, the use and purposes of impeachment and rebuttal evidence, and punitive damages.

A. Affirmative defenses.

Alleged pilot negligence was imputed to the innocent passengers to deny recovery.

Jury Instructions 27A, 29 and 30, supplied by the defendants, contained the clause, "[T]hen your verdict on this claim must be for the plaintiffs, unless you should also find that Mountain Bell or the pilot crew *was negligent* . . . ." 727 F.2d at 924, 925 (Appendix A-12,13,14). This language misstates the law of Colorado, which provides that *only* an affirmative defense *other than contributory negligence* could bar a finding of negligence on the part of the defendants in this product liability case. *See*: CJI-Civ.2d 14:1 (1980), Manufacturer's Liability Based on Negligence — Elements of Liability (Appendix P-1,2). Despite plaintiffs' objections that the instructions were not supported by the evidence, Instructions 45 and 46 instructed the jury on the defenses of assumption of risk and product misuse as to all of the plaintiffs, *including the passengers*. 727 F.2d at 928 (Appendix A-21). The Tenth Circuit, nevertheless, upheld the giving of the instructions in view of the "totality" of the instructions, and "when read in context." 727 F.2d at 925, 928 (Appendix A-15,22). The Tenth Circuit stated that plaintiffs did not raise the objections "here posited", only that the evidence was insufficient to support the instructions. 727 F.2d at 928 (Appendix A-21). But under Colorado law of affirmative defenses, this is the very objection to make.

Contributory negligence has *not* been the law in Colorado for several years, but *comparative* negligence could apply. However, Colorado law provides that even *comparative* negligence does not apply to *strict liability*, i.e., to a Restatement (Second) of Torts § 402A products liability claim. *Kinard* v. *Coats Company, Inc.*, 37 Colo. App. 555, 553 P.2d 835 (1976), *cert. denied*. Colorado adopted § 402A in its entirety in *Hiigel* v. *General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1976). That dangers may arise from improper use is *not* a defense; the manufacturer is still obligated to warn. *Id.* at 988.

Additionally, Colorado cases supporting the concept that the negligence, if any, of a *pilot should not be imputed* to the *passengers* to bar or reduce recovery, include: *Hinkle* v. *Union Transfer Co.*, 229 F.2d 403, 405 (10th Cir. 1955); *Moore* v. *Skiles*, 130 Colo. 191, 274 P.2d 311, 313 (1954); *Parker* v. *Ullom*, 84 Colo. 433, 271 P. 187, 189 (1928); *Colorado & S. Ry.* v. *Thomas*, 33 Colo. 517, 81 P. 801, 803 (1905).

Under Colorado law, unless the defendant establishes that: (a) the *particular plaintiff* involved personally had *subjective* knowledge of the *specific* danger created by a product defect, and (b) that the plaintiff voluntarily and unreasonably encountered a known danger, these defenses are not available against that plaintiff. *Union Supply Co.* v. *Pust*, 196 Colo. 162, 583 P.2d 276 (1978); *Good* v. *A.B. Chance Co.*, 39 Colo. App. 70, 565 P.2d 217 (1977), *cert. denied.* Contrary to these decided cases setting forth Colorado law, the defenses of assumption of risk and product misuse were applied to the claims of the *surviving paraplegic passenger* and the widows and children of the other passengers, as well as to the survivors of the pilots. The Tenth Circuit, sustaining the trial judge, refused to apply the standards set forth in Colorado law.

The Colorado Supreme Court recently reaffirmed the proposition that jury instructions on the defense of assumption of the risk may not be given unless the defendant demonstrates that the plaintiff had *actual* knowledge of the *specific* danger posed by the defect; general knowledge of the possibility of danger is insufficient to warrant an instruction. *Jackson* v. *Harsco Corporation*, 673 P.2d 363, 366 (Colo. 1983). Evidence of product misuse must rise to the level of a use not reasonably foreseeable to the defendant. *Id.* at 367, 368.

There was not even a scintilla of evidence in this case to support the affirmative defenses of assumption of risk and product misuse *against the passenger plaintiffs*, yet the trial court refused plaintiffs' requests to strike the affirmative defenses as against all parties plaintiff.

While there was some testimony that the pilot and co-pilot may have had some knowledge of a prior harmless non-disengagement of the autopilot (as later revealed by Collins Avionics Service Letter 1-77 as possibly due to a need for plunger lubrication), the catastrophic effect of the autopilot running the stabilizer trim to full nose up was experienced for the very first time by Dassault, according to Dassault, a year after the Mountain Bell crash. There was a total lack of evidence in the Mountain Bell case as to knowledge of the specific danger posed by the defect. Clearly, the Colorado Supreme Court would disagree with the Tenth Circuit's analysis that giving these instructions did not constitute reversible error. In *Jackson*, cited above, the court held that, where there is insufficient evidence to support either defense, the case *must be reversed and remanded for a new trial.* 673 P.2d at 367, 368.

B. Impeachment and rebuttal.

In sustaining the trial court's exclusion of Exhibit 19, Newsflash 16, for purposes of impeachment and rebuttal, the Tenth Circuit contradicted the law and policy of Colorado. *See: Burr* v. *Green Bros. Sheet Metal, Inc.*, 159 Colo. 25, 409 P.2d 511, 515 (1966) (photograph taken four days after accident admissible for impeachment).

Also, in *People* v. *Cole*, 654 P.2d 830 (Colo. 1982), the Colorado Supreme Court ruled that a trial court *misapplied the principle of Rule 403* in excluding certain rebuttal testimony. If the testimony had been offered as direct evidence, then "it would have been proper for the trial court to review it for relevance and materiality and to weigh its probativeness against the risk of unfair prejudice to the defendant." *Id.* at 834. Where the evidence was offered in rebuttal, there existed an entitlement "to introduce competent evidence to explain, refute, or disprove the statement, since the defendant's credibility was in issue." *Id.*

Exhibit 19, Newsflash 16, was offered by plaintiffs in rebuttal, and just as in *Cole*, should have been admitted.

Newsflash 16 should have been admissible to refute the defense contentions of pilot negligence pursuant to *Rinkus* v. *Northwest Colorado Ski Corporation*, 706 F.2d 1060 (10th Cir. 1983). Once again the Tenth Circuit sustained an improper use of Rule 403 by the trial court to *overrule Colorado state law.*

C. Punitive damages.

The trial court dismissed the punitive damages claim of the surviving passenger, Beverly Miles, ruling that a claim for punitive damages is limited by the one-year statute of limitations on claims of a penal nature provided in Colo. Rev. Stat. §13-80-104 (1973). The judge relied solely on his own earlier ruling in *Sherwood* v. *Graco*, 427 F.Supp. 155 (D.Colo. 1977). In three cases, two other judges in the United States District Court for the District of Colorado, in construing Colorado law, have ruled *exactly the opposite*, i.e., that a punitive damages claim is barred in time only by the limitation of the underlying tort claim. *See*: Judge John Kane in *Dorney* v. *Harris*, 482 F.Supp. 323 (D.Colo. 1980); Judge Jim Carrigan in *Resource Exploration and Mining, Inc.* v. *Itell Corp.*, 492 F.Supp. 515 (D.Colo. 1980); and Judge Jim Carrigan in *Wise* v. *Olan Mills, Inc. of Texas*, 495 F.Supp. 257 (D.Colo. 1980).

In *Jones* v. *Harding Glass Co., Inc.*, 44 Colo. App. 437, 619 P.2d 777 (1980), *rev'd on other grounds*, 640 P.2d 1123 (Colo. 1982), the Colorado Court of Appeals held explicitly that the one-year statute of limitations did not bar a claim for punitive damages which was not barred by the statute of limitations for the underlying tort. *See also: Adams* v. *Paine, Webber, Jackson & Curtis, Inc.*, ____ P.2d ____ (Colo. App. No. 80CA1226, December 8, 1983). In *Adams*, the Colorado Court of Appeals adopted the rulings of *Jones* v. *Harding Glass* and *Resource Exploration* v. *Itell*, cited above.

Under the substantive law of Colorado, therefore, the punitive damages claim of Beverly Miles should have been allowed. The Tenth Circuit refused to decide whether the trial court erred in applying a one-year statute of limitations.

727 F.2d at 935 (Appendix A-36). Thus, Beverly Miles was prejudiced from the outset in that she had a substantive right to claim punitive damages but was not allowed to do so.

Justice in Colorado should not depend upon the luck of the draw. The right to present a particular theory of recovery to the jury in a diversity action should not depend upon which particular district judge is assigned to hear the case. The Tenth Circuit not only failed to apply Colorado law on this issue, but also failed to resolve a conflict of opinion among the United States District Court judges for the District of Colorado, which can only be described as a disorderly circumstance for litigants.

IV. This Case Carries On And Creates Conflicts Among The Circuits On The Same Matters.

The Court of Appeals for the Tenth Circuit has rendered a decision in conflict with the decision of another federal court of appeals on several important matters of federal law. (Supreme Court Rule 17.1(a).)

A. This case carries on conflicts among the circuits on the same legal issue regarding Rule 407.

The Tenth Circuit held: "[T]hat Rule 407 does not exclude post-accident remedial measures in *product liability cases*." 727 F.2d at 932 (Appendix A-29). The court stated further: "It is our view that when state courts have interpreted Rule 407 or its equivalent state counterpart, the question whether subsequent remedial measures are excluded from evidence is a matter of *state policy*." *Id.*

Seven other circuit courts of appeals, however, have held that Rule 407 excluding post-accident remedial measures, *applies* to *strict liability* actions, as distinguished from negligence actions. *See*: *Roy* v. *Star Chopper Co., Inc.*, 584 F.2d 1124 (1st Cir. 1978), *cert. denied*, 440 U.S. 916 (1979); *Estate of Spinosa*, 621 F.2d 1154, 1160 n. 5 (1st Cir. 1980); *Cann* v. *Ford Motor Company*, 658 F.2d 54 (2nd Cir. 1981), *cert.*

denied, 456 U.S. 960 (1982); *Lindsay* v. *Ortho Pharmaceutical Corp.*, 637 F.2d 87 (2nd Cir. 1980); *Knight* v. *Otis Elevator Co.*, 596 F.2d 84 (3rd Cir. 1979); *Josephs* v. *Harris Corp.*, 677 F.2d 985 (3rd Cir. 1982); *Werner* v. *Upjohn Co., Inc.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); *Grenada Steel Industries* v. *Alabama Oxygen Co.*, 695 F.2d 883 (5th Cir. 1982) (providing a lengthy summary of cases and commentary); *Bauman* v. *Volkswagenwerk Aktiengesellschaft*, 621 F.2d 230 (6th Cir. 1980); *Hall* v. *American S.S. Co.*, 688 F.2d 1062 (6th Cir. 1982); *Oberst* v. *International Harvester Co., Inc.*, 640 F.2d 863 (7th Cir. 1980).

The Eighth Circuit has held that Rule 407, excluding post accident remedial measures, does *not* apply to strict liability actions. *See*: *Farner* v. *Paccar, Inc.*, 562 F.2d 518, 528 (8th Cir. 1977); *Robbins* v. *Farmers Union Grain Terminal*, 552 F.2d 788 (8th Cir. 1977).

Judge McKay, concurring in *Moe*, noted this important conflict. 727 F. 2d at 936 (Appendix A-38).

B. Fed. R. Evid. 403 has varying application among the circuits.

The Tenth Circuit sustained the exclusion of evidence of Newsflash 16, of the 47 Arthur Q failures and 23 hydraulic failures noted in the Service Reports and Customer Contact Reports, and of the McGraw-Edison Incident, all pursuant to Fed. R. Evid. 403.

By the action of the trial court, affirmed by the Tenth Circuit, the scope of Rule 403 was broadened to encompass *overruling state substantive law*. All of this was done based on the conclusory statements of the trial judge that he had mentally conducted a "balancing process" under Rule 403. No findings were made by the trial court as to the factors used by the judge to determine potential prejudice or to the weights assigned to the various factors considered.

This is contradistinguished from the position of the U.S. Court of Appeals for the Third Circuit, which requires that in

exercising his discretion under Rule 403 the trial judge *articulate the factors considered* and *assign a given weight to each factor. United States* v. *Criden*, 648 F.2d 814, 819 (3rd Cir. 1981); *United States* v. *Lebovitz*, 669 F.2d 894, 901 (3rd Cir. 1982), *cert. denied*, 102 S.Ct. 1979 (1982). If this case had been brought in the Third Circuit, therefore, the outcome on the evidentiary issues and consequently the case itself might well have been the opposite.

C. The application of Fed. R. Civ. P. 5l among the circuits.

Jury Instructions 27A, 29 and 30 contained the clause, "[T]hen your verdict on this claim must be for the plaintiffs, unless you should also find that Mountain Bell or the pilot crew was negligent.. . ."

The Tenth Circuit agrees that this language *misstates* the law of Colorado, which provides that only an affirmative defense *other than* contributory negligence, could bar a finding of negligence on the part of the defendants in this product liability suit. *See*: CJI-Civ.2d 14:1 (Appendix P-1, 2).

The plaintiffs had supplied correct instructions and these erroneous instructions were supplied by the defense, although the record does not in specific terms show an objection to these instructions.

The appellate court found this misstatement of the law insufficient to support the "plain error" exception to Fed. R. Civ. P. 51 because the "totality" of the jury instructions support the view that the jury was unable to find any *causal* negligence by any party. 727 F.2d at 925 (Appendix A-15). However, Instructions 27A, 29 and 30, speak only to "negligence", omitting the word "causal." The jury *did* find Mountain Bell negligent, thus permitting the jurors to follow the contributory negligence clause contained in the instructions and deny recovery to all plaintiffs. While stating that this possibility was too "speculative" and "hypothetical" to support a "plain error" exception to Rule 51, the Tenth Circuit engaged in the equally "speculative" and "hypothetical" assumption that the effects of the misstatement of law to the

jury were alleviated because the instructions were "taken as a whole". *See*: 727 F.2d at 925 (Appendix A-15, 16).

If some instructions *misstate* the law, it is *unfair to presume that the jurors, themselves, corrected the errors* by reading the instructions "as a whole". Erroneous jury instructions are "presumptively injurious." *Northern Pacific Railway* v. *Herman*, 478 F.2d 1167, 1171 (9th Cir. 1973). Furthermore, "Error in a specific instruction is not cured by general statements which set out the respective contentions." *Id.*

In *Brown* v. *Avemco Investment Corp.*, 603 F.2d 1367 (9th Cir. 1979), the Ninth Circuit pointed out that *Fed. R. Civ. P. 51 must be read in conjunction with Fed. R. Civ. P. 46,* which provides that *formal exceptions are unnecessary* where a party makes his desires known to the court. In reviewing a Rule 51 issue, it is necessary to consider Rule 46 to determine whether action short of formal objection satisfied the requirements of Rule 51. *Id.* at 1370. Accordingly, the *Brown* v. *Avemco* court reversed a judgment in favor of the defendant on the basis of a jury instruction to which the plaintiff had not objected. *Id.* at 1371.

The plaintiffs in the present case gave the trial court notice of their position by tendering Plaintiffs' Proposed Instruction No. 3 (Appendix Q), *which was a correct statement* of the negligence law applicable to this case. (Appendix R). This *instruction was refused* by the trial court. All proposed instructions were later considered re-tendered (and re-refused), embodying prior comments. (Appendix S-1, 2). Additionally, plaintiffs' counsel objected to the insertion of certain strict liability language in Instructions 27A, 29 and 30, but was overruled. (Appendix T). The erroneous versions supplied by defense counsel were the ones that went to the jury.

Without specific guidance as to the application of Rule 51, or its interrelationship with Rule 46, the Tenth Circuit

exalted "form over substance" and refused to review, upholding the defendants' erroneous instructions, even though plaintiffs' counsel had supplied the trial court with correct instructions under Colorado law. *See: Brown* v. *Avemco*, 603 F.2d at 1371.

V. NTSB Testimony Of Cause Was Admitted Into Evidence In Violation Of Federal Statutory Law.

The Federal Aviation Act of 1958, 49 U.S.C. §1441(e), provides that no part of any investigative report shall be used at trial. (Appendix J). The federal regulation pertaining to testimony of employees of the National Transportation Safety Board, 49 C.F.R. §835.3, provides that employees of the Board shall not give opinion testimony concerning the cause of the accident. (Appendix K). In spite of this prohibition of NTSB testimony relating to the cause of the accident, testimony from the deposition of a member of the NTSB investigative team, which contained the investigator's opinion concerning a cause of the accident, was admitted into evidence over plaintiffs' objection. (Appendix U-1, 2). Appearing at Appendix W, that testimony reads: "We found that there was no indication that the engine had been contributory to the accident."

That this was objectionable "opinion" under the statute was confirmed during the deposition by NTSB counsel, Mr. Rolef, who instructed the deponent: "Not to give any responses to the cause of the accident, which I think that response does." (Appendix V). Yet the trial court admitted the objectionable opinion evidence.

Although the admitted testimony related explicitly to proximate ("contributory") cause, the Tenth Circuit did not mention the admission of this testimony in its opinion, holding simply that the "balance of plaintiffs-appellants' contentions of error" were without merit. 727 F.2d at 935 (Appendix A-35). The appellate court again deferred to the discretion of the trial judge in lieu of adequate review. *Id.* The Tenth Circuit, itself, has previously ruled that NTSB testimony as

to cause is not admissible at trial. *See: Keen* v. *Detroit Diesel Allison*, 569 F.2d 547, 551 (10th Cir. 1978).

Cases supporting the proposition that NTSB evidence of probable cause may not be admitted into evidence or used at trial in any manner include: *Traveler's Ins. Co.* v. *Riggs*, 671 F.2d 810 (4th Cir. 1982); *McCandless* v. *Beech Aircraft, Inc.*, 697 F.2d 1156 (D.C. Cir. 1983). The application of the aforementioned federal statute and federal regulation is also significant in actions tried in state courts. *See: e.g., Carlson* v. *Piper Aircraft Corp.*, 57 Or. App. 695, 646 P.2d 43 (1982), *cert. denied*, 293 Or. 801, 653 P.2d 999 (1982); *McGee* v. *Cessna Aircraft Co.*, 139 Cal. App. 3rd 192, 188 Cal. Rptr. 542, (1983) (citing *Keen); Murphy* v. *Colorado Aviation, Inc.*, 41 Colo. App. 237, 588 P.2d 877 (1978). The correct interpretation and application of 49 U.S.C. §1441(e) and 49 C.F.R. §835.3 should be supplied by this Court and consequently made consistent in all federal and state courts.

CONCLUSION

Alleged pilot negligence must not be imputed to his passengers. The passengers on this flight were not unlike those hundreds of thousands who daily ride the airliners of America. Faultless themselves, trusting and confident in the aircraft and its equipment, they cannot and are not expected to know of defects in the aircraft known to the pilots.

But this Falcon 10 jet did have such defects. At least one was described a year later, by the manufacturer itself, as an "insidious failure", i.e., "awaiting a chance to entrap". There is absolutely no stretch of the imagination which can support the idea that paraplegic passenger Beverly Miles, or the other passengers, were aware of any problem with the autopilot. Surely, no one on this Court would suggest these passengers or Beverly Miles should bear any responsibility for the crash, yet they have been denied recovery from these defendants, who have acknowledged that the Falcon 10 went out of control and agree that the autopilot caused the crash. Colorado

law correctly recognizes this and does not allow assumption of risk and product misuse to be applied to their claims, and excludes such defenses from the pilots' widows claims. Yet this opinion, in its support of the incorrect instructions 45 and 46, does just that.

Millions of dollars are at risk, and cases are won and lost in our federal courts on evidentiary issues. Every litigant in a federal court is affected by the interpretation and application of the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Although a prejudiced party may have the right of appeal, this is an empty remedy inasmuch as appellate courts rarely reverse the trial court on evidentiary rules of law. Although an appellate court may have as much information before it as the district court had, the appellate court does not have appropriate standards and guidelines necessary for the adequate review of the exercise of trial court discretion. The result is that equivalent, if not identical, issues are resolved differently among the federal district courts in this country. The scope of discretion under the rules is too broad to permit the development of a uniform criteria for the interpretation and application of the rules. Only the Supreme Court of the United States can do this. By using this case as a foundation, much uniformity of decision and consequently fairness of trials can be gained.

WHEREFORE, plaintiffs-petitioners respectfully request that their petition for writ of certiorari be granted.

DATED this 29th day of June, 1984.

The Law Offices of
L. B. Ullstrom

L. B. Ullstrom
601 Broadway, Suite 400
Denver, Colorado 80203
(303 292-3880)

Attorneys for Petitioners

APPENDIX A

1-30-84

82-1256 - 82-1257
82-1258 - 82-1259

United States Court of Appeals

For the Tenth Circuit

SLIP OPINION

Nos. 82-1256 82-1257
82-1258 82-1259

PUBLISH

United States Court of Appeals

TENTH CIRCUIT

DOLORES E. MOE, ERIC R. MOE, KRIS L. MOE, AND LEIF A. MOE; JUDY ELAINE RENZELMAN, INDIVIDUALLY, AND AS CONSERVATOR AND NEXT FRIEND OF MINOR, BRAD ALLEN RENZELMAN; ELAINE L. WHISTLER, PAUL W. WHISTLER, DIANE WHISTLER AWALT; JOAN ELAINE ANDERSON, INDIVIDUALLY, AND AS GUARDIAN AD LITEM AND NEXT FRIEND OF MINORS, ELIZABETH JOAN ANDERSON AND CHRISTOPHER ANDREW ANDERSON; BEVERLY L. MILES; AND THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A COLORADO CORPORATION,

Plaintiffs-Appellants and Cross-Appellees,

v.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, FALCON JET CORPORATION, AND THE GARRETT CORPORATION,

Defendants-Appellees and Cross-Appellants.

(D.C. No. 79-F-352)

MYLES J. DOLAN AND L. B. ULLSTROM (ROBERT J. TRUHLAR WITH THEM ON THE BRIEF), DENVER, COLORADO, FOR PLAINTIFFS-APPELLANTS AND CROSS-APPELLES.

W. ROBERT WARD (EDWARD J. GODIN, DENVER, COLORADO, AND MATTHEW J. CORRIGAN, NEW YORK CITY, NEW YORK, WITH HIM ON THE BRIEF), DENVER, COLORADO FOR DEFENDANT-APPELLEE AND CROSS-APPELLANT AVIONS MARCEL DASSAULT-BREGUET AVIATION.

RONALD O. SYLLING (JOHN W. GRUND AND DAVID M. SETTER WITH HIM ON THE BRIEF) OF TILLY & GRAVES, P.C., DENVER, COLORADO, FOR DEFENDANT-APPELLEE AND CROSS-APPELLANT FALCON JET CORPORATION.

RICHARD C. COYLE, OF PERKINS, COIE, STONE, OLSEN & WILLIAMS, SEATTLE, WASHINGTON (KEITH GERRARD AND REX C. BROWNING OF PERKINS, COIE, STONE, OLSEN & WILLIAMS, SEATTLE, WASHINGTON WITH HIM ON THE BRIEF) (EDWIN S. KAHN OF KELLY, HAGLUND, GARNSEY AND KAHN, DENVER, COLORADO, ALSO WITH HIM ON THE BRIEF), FOR DEFENDANT-APPELLEE AND CROSS-APPELLANT THE GARRETT CORPORATION.

Appeal from the United States District Court For the District of Colorado

Before McWILLIAMS, BARRETT and McKAY,
Circuit Judges.
BARRETT,
Circuit Judge.

The plaintiffs-appellants appeal from a judgment entered on jury verdicts for the defendants-appellees in an action for damages for wrongful deaths, personal injuries and property damages on theories of negligence and strict product liability arising from an airplane crash near Denver, Colorado at 4:52 a.m. on April 3, 1977. Jurisdiction vests by virtue of diversity of citizenship under 28 U.S.C. § 1332. Plaintiffs claimed multiple theories of negligence and defect as the cause of the crash, including defective design of the autopilot system, runaway to the high position of the artificial feel system (Arthur Q), clogging of the suction filters for both of the two independent hydraulic systems, or a combination of the above, together with defect of the powerplant system and a failure to warn.

The airplane involved in the crash was a French manufactured Falcon 10 twin engine turbofan-powered aircraft owned by Mountain Bell, capable of carrying two pilots and seven passengers. The plane was manufactured in France by Avions Marcel Dassault-Brequet Aviation (AMD), a French corporation. The engines of the aircraft were designed, manufactured and sold by the Garrett Corporation (Garrett), a California corporation. Falcon Jet Corporation (Falcon Jet) is a Delaware corporation, engaged in the business of purchasing Falcon 10 aircraft from AMD and selling, maintaining, and providing logistic support and advice for the aircraft sold in the United States. The subject aircraft was sold by AMD to Falcon Jet, which in turn sold the plane to Mountain Bell in September, 1974. The plane had been in continual use by Mountain Bell from September, 1974, to the date of the crash on April 3, 1977. The crash resulted in the deaths of pilots Kenneth Moe and Rodney Renzelman and Mountain Bell employees-passengers Douglas Whistler and Andrew Anderson. Beverly L. Miles, a passenger-employee, alone survived the crash. She suffered extensive, permanent injuries. The aircraft was destroyed.

The trial was separated by the trial court on liability and damages. The trial on liability was before a twelve person

jury. It lasted five and one-half weeks. At the outset, we observe some basic rules governing our appellate review. In *Miller* v. *City of Broken Arrow, Okl.*, 660 F.2d 450, 455-56 (10th Cir. 1981) we said, *inter alia:*

> . . . In a diversity of citizenship case the federal district court sits as a state trial court and applies the law of the forum state, *Hackbart* v. *Cincinnati Bengal, Inc.*, 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 . . . (1979). The federal district court [or jury if tried to jury], as trier of fact, has the responsibility of weighing the credibility of the witnesses. *Bingham* v. *Bridges*, 613 F.2d 794 (10th Cir. 1980). On appeal, the reviewing court must view the evidence in the light most favorable to the prevailing party. *Rasmussen Drilling* v. *Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978), *cert. denied*, 439 U.S. 862 . . . (1978). A judgment may be affirmed on any ground arising from the record. *Casto* v. *Arkansas-Louisiana Gas Company*, 597 F.2d 1323 (10th Cir. 1979). Findings of a trial court will not be disturbed on appeal unless they are clearly erroneous. *Volis* v. *Puritan Life Insurance Company*, 548 F.2d 895 (10th Cir. 1977), Fed. Rules Civ. Proc. Rule 52, 28 U.S.C.A. . . .

A recital of the facts follows. The Falcon 10 aircraft was thoroughly tested and met the Federal Aviation Administration (FAA) requirements in 1973. Mountain Bell had owned and operated the aircraft for some two and one-half years prior to the crash. It had been flown about 1,550 hours, and had no history of hydraulic system or Arthur Q (artificial feel system) problems. The day prior to the crash the plane had been given a 150 hour periodic inspection by two licensed aviation mechanics employed by Mountain Bell. They certified the airplane as airworthy. The evidence of what transpired during the accident flight consisted primarily of tape recordings between the crew and the FAA traffic controller,

the FAA radar data, the wreckage of the aircraft, data compiled and analyzed by the National Transportation Safety Board (NTSB), testimony and statements of the surviving passenger, Beverly L. Miles, and the testimony of Donald Mosher, the FAA controller on duty at Stapleton Airport Tower who watched the flight of the plane to the crash site on a radar scope and who listened to the radio communications. Prior to takeoff in the early morning darkness, with experienced pilot Kenneth Moe in command and experienced co-pilot Rodney Renzelman serving as crew, the FAA controller had to correct the crew's mistaken read back of its takeoff clearance, and soon after takeoff the controller reminded the crew that it forgot to turn on the plane's transponder. The aircraft climbed to an altitude of 12,000 feet where the crew reported a "little problem" and requested clearance to return to Stapleton. During the course of communications, the cabin pressure horn in the cockpit could be heard. Beverly Miles testified that there was an oxygen mask drop during the flight. During the 150 hour inspection, the Mountain Bell aviation mechanics had pulled the circuit breakers for the pressurization equipment of the airplane, but apparently did not reset them. The crew turned the plane left to return to Stapleton and then made two descending 360 degree left turns, during which a crew member radioed that the aircraft was "out of control," followed by a crew call of "May day, May day, May day" and, finally, "we have no trim, no hydraulics . . . no control." Controller Mosher testified that following the two descending turns, the plane flew about seven miles of relatively straight flight when the crew requested vectors or headings for a landing on Runway 35. They were assigned a heading of 170 degrees. The crash occurred in a wheat field northeast of Stapleton about fifteen seconds after the assigned heading was given. Mosher testified that there were no crew transmissions concerning power, control or other problems after clearance was given.

The plaintiffs' theory of the crash was that the Falcon 10 had a defective flight control system. Plaintiffs' expert, Alvin S. White, testified that the probable cause for the crew's loss

of control of Falcon 10 was a combination of problems in the flight control system, including the hydraulic system, the artificial feel system (Arthur Q) and the autopilot, which plaintiffs contended to be the most dangerous system. Other expert witnesses called by the plaintiffs were Loren Martin, Dean Stull, Maxwell Dow and John M. Wetzler. The evidence reflects that if a pilot engages the autopilot and then attempts to fly the aircraft manually with the autopilot engaged, the autopilot causes the plane to respond opposite to the pilot's control inputs. There is no clear warning that the autopilot is still engaged after the pilot attempts to disengage it by use of the yoke disconnect switch. Plaintiffs' evidence was that the stiffness of Arthur Q runaway, or hydraulic clogging, masked and camouflaged the fact that the autopilot had not disengaged. Further, plaintiffs presented evidence that neither engine was producing power, nor capable of producing power, at the point of crash. This was predicated on the testimony of Mr. John M. Wetzler, an expert, that the tailpipes on both engines collapsed (imploded or were completely shut prior to impact) resulting from the violent flight maneuvers and gyrations while the plane was out of control. Wetzler did not testify that the engine design was defective. Plaintiffs contended that the flight control system failure and the subsequent loss of engine power were the contributing and ultimate causes of the crash.

The defendants defended the plaintiffs' claims of negligence and sale of a defective product on denial and affirmative defenses of voluntary, unreasonable use of a defective product with knowledge of the specific danger, and misuse of the aircraft as the cause of the accident.

All parties presented expert witnesses who related different opinions as to the cause of the crash. The plaintiffs' expert witness, Mr. Alvin S. White, opined, among other things, that the autopilot system problem was the most improbable of the problems he identified. White acknowledged that if the crew operating the plane at the time of the accident had known of the autopilot problem testified to by Captain Richard F.

Bucknell, Manager of Flight operations for Mountain Bell, who was called as an adverse witness by defendants, that this would constitute adequate warning to Mountain Bell and the pilot crew involved in the crash. Bucknell testified that shortly prior to the subject accident he was piloting the Falcon 10 with Kenneth Moe serving as co-pilot when, after punching the yoke disconnect button, the autopilot did not disengage. In a matter of a few seconds, realizing that he had no manual control, he disengaged the autopilot with his right hand. [R. App. Vol. VI, pp. 169-175]. Bucknell discussed the problem with Mr. Moe [R. App. Vol. VI, pp. 173-174]. There is evidence that Rodney Renzelman was informed of the problem. The defendants' expert, Jack Waddell, an experienced test pilot employed by Garrett, testified that there are multiple means of disconnecting the autopilot and that the crew should confirm and identify disconnect before assuming manual flight. He opined that prolonged manual flights while the autopilot is engaged constitutes crew negligence and misuse, given the uncontroverted testimony of Captain Bucknell of Mountain Bell that Mountain Bell and the pilot crew of the Falcon 10 involved in the crash were actually aware of the loss of control which occurs when the yoke switch malfunctions and the pilot attempts manual flight control.

As the trial court observed, this was a "highly contested, complex trial" involving "multiple theories of recovery, including multiple or combinations of failures in various complicated systems of the aircraft" which claims were "based on negligence and strict liability" advanced in a trial which lasted five and one-half weeks, involving exhibits in excess of 250 and 49 witnesses, including depositions and one live offer of proof. [R., App. Vol. IV, p. 142]. In denying the plaintiffs' motion for judgment notwithstanding the verdict, the trial court observed, *inter alia:*

> We sat through the trial. We heard the witnesses, and we examined the evidence. We believe that it is clear that viewing the evidence and inferences in a light most favorable to the defendants,

> reasonable persons could reach different conclusions, and the evidence was in conflict. Therefore, plaintiffs are not entitled to a judgment notwithstanding the verdict . . . Because of the nature of the trial, the results would not have been different had the trial been entirely free of error. Each side had a full opportunity to explore all issues and facts. Plaintiffs received a full, adequate, and fair trial, and any error which may have occurred did not prejudice presentation of their case in a balanced manner.

[R., App., Vol IV, pp. 142, 143].

The jury unanimously found by Special Verdict Form A all defendants were not negligent. By Instructions 21, 39 through 49 and Special Verdict Forms B-1 through B-11 the jury returned a verdict in favor of each defendant on plaintiffs' claims for strict product liability. [R. App. Vol VII, pp. 240-243]. The jury did not find pilots Kenneth L. Moe and Rodney Renzelman negligent. The jury found plaintiff Mountain Bell negligent but did not find that the negligence was a cause of the accident. The jury did not respond to Question 13 relating to a determination of comparative negligence. [R., App. Vol. VIII, pp. 239-245].

Further factual recitation will be made in dealing with specific issues presented on appeal. The plaintiffs-appellants contend that the trial court erred (1) in misstating Colorado law through jury instructions which prohibited the finding of negligence on the part of defendants if any contributory negligence as to the pilots or to Mountain Bell was also found, (2) in limiting Plaintiffs' claim by failing to instruct the jury on claims for sale of defective product as to Falcon Jet (the seller) and Garrett (seller of the engines), (3) in misinterpreting Colorado law on assumption of risk and misuse by making that defense available to the defendants against all the plaintiffs in this strict product liability suit, (4) in entering judgment based on inconsistent verdicts, (5) in denying

the admission into evidence Newsflash 16, a document published by a defendant and demonstrative of the need to warn of a known defect in the aircraft, by ruling that negligence and strict liability in tort are one and the same under Fed. R. Evid. 407, (6) in denying the admission into evidence of the testimony of a surviving pilot from a similar out of control Falcon jet emergency incident, (7) in denying the use by plaintiffs of business documents kept by defendants, (8) by denying plaintiffs the opportunity to use as rebuttal evidence to National Transportation Safety Board (NTSB) findings, a telex message, indicating that Falcon Jet intended to protect any unfavorable evidence concerning this accident, sent by Falcon Jet to AMD, (9) in contravening federal statutory law and Tenth Circuit case law by allowing into evidence NTSB testimony as to the cause of the accident, (10) in allowing prejudicial misrepresentations by defendant's counsel to go uncured, (11) in applying a one-year bar to a claim for punitive damages under Colorado law, and (12) in prejudicing the plaintiffs by bifurcation of the trial.

Defendant AMD cross appeals, contending that the trial court erred and abused its discretion in refusing to tax as costs for AMD the reasonable and necessary costs of partial daily transcripts, exhibits used at trial, travel expenses of experts and French company employees beyond one hundred miles, and depositions used but not read into the record at trial, in total amount of $20,654.21. Defendant Falcon Jet cross appeals from the trial court's disallowance of $8,310.05 of costs incurred. Defendant Garrett Corporation also cross appeals from the trial court denial of witness costs, daily transcripts and deposition costs in approximate amount of $22,679.95.

I.

Plaintiffs-appellants contend that the trial court erred in giving incorrect instructions on the Colorado law of negligence which effectively precluded the jury from finding negligence on the part of the defendants if contributory negligence

as to the pilots or to Mountain Bell was also found. These contentions are specifically directed to Instructions 27A, 29 and 30. We here observe that the trial court was constantly alert to the need to avoid jury confusion. In order to achieve this, the court meticulously advised the jury that specific evidence could be considered only in regard to specific claims and parties. Furthermore, the court instructed the jury separately as to plaintiffs' various claims against each of the three defendants, both with respect to negligence and strict liability.

First and foremost, there is no explanation by plaintiffs'-appellants' trial counsel why no objection was lodged to these instructions before the jury retired. Fed. Rules Civ. Proc. Rule 51, 28 U.S.C.A. provides, *inter alia*:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to make the objection out of the hearing of the jury.

See also, Prebble v. *Brodrick*, 535 F.2d 605, 612 (10th Cir. 1976).

> A party cannot sit idly by and permit erroot review instructio given to which no objections were lodged before the jury retired for deliberation unless they are patently plainly erroneous and prejudicial. Such is not the case here. In *Fiedler* v. *McKea Corp.*, 605 F.2d 542, 548 (10th Cir. 1979) we stated that we will not review the "propriety" of an instruction given in the absence of an objection. Here, the trial court was not alerted by counsel for plaintiffs or plaintiffs proper to any challenges to the subject instructions given. The purpose of Rule 51, *supra*, is to make it clear to the trial court what the objecting party's position is in order to provide the trial court

the opportunity to make proper changes, corrections or additions. *Rogers* v. *Northern Rio Arriba Electric Cooperative, Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978).

Instruction No. 27A reads as follows:

> In order for the plaintiffs to recover from the defendant Dassault on their claim of negligence, you must find all of the following have been proved:
>
> 1. That Dassault was negligent in designing or testing the Falcon 10 aircraft or in failing to provide sufficient warnings and instructions on use of the aircraft in that it failed to exercise reasonable care to prevent the aircraft from creating an unreasonable risk of harm to person or property while the aircraft was being used in the manner Dassault should reasonably have expected;
>
> 2. The accident was caused by the negligence of Dassault while the aircraft was being used in the manner that Dassault should reasonably have expected.
>
> If you find that either or both of these two propositions have not been proved by a preponderance of the evidence, then your verdict on this claim must be for Dassault.
>
> On the other hand, if you find that both of these propositions have been proved by a preponderance of the evidence, then your verdict on this claim must be for the plaintiffs, unless you should also find that Mountain Bell or the pilot crew was negligent in failing to maintain the aircraft properly, failing to train the crew properly, or failing to fly the aircraft properly. In any event, you shall answer the questions contained on Special Verdict Form A, and your foreperson shall complete it and all jurors shall sign it.

[R., App. Vol. IX, p. 18].

Instruction No. 29 read as follows:

In order for any one of the plaintiffs to recover from defendant Garrett on the plaintiffs' claim of negligence you must find that each of the following have been proved.

1. Garrett had design responsibility for the engine or tailpipe;

2. Defendant Garrett was negligent in that it failed to exercise reasonable care to design the engine or tailpipes so that they would not create an unreasonable risk of harm to person or property while the aircraft was being used in the manner defendant Garrett should reasonably have expected; and

3. The accident was caused by such negligence while the aircraft was being used in the manner that Garrett should reasonably have expected.

If you find that any or all of these propositions has not been proved by a preponderance of the evidence, then your verdict on this claim must be for the defendant Garrett.

On the other hand, if you find that all of these propositions have been proved by a preponderance of the evidence, then your verdict on this claim must be for the plaintiffs, unless you should also find by a preponderance of the evidence that Mountain Bell and the aircraft crew was negligent in failing to maintain the aircraft properly, failing to train the crew properly, or failing to operate the aircraft properly. In any event, you shall answer the questions contained on Special Verdict Form A, and your foreperson shall complete it and all jurors shall sign it.

[R., App. Vol. IX, p. 19].

Instruction No. 30 read as follows:

If Garrett knew or in the exercise of reasonable care should have known that the use of the engine by Dassault as a component part in Dassault's aircraft might be harmful or injurious to others and that the danger of such harm or injury would not be obvious to or otherwise known by Dassault or Dassault's subcontractor, Grumman Aircraft Corporation, then Garrett was obligated to use reasonable care to warn Dassault or Grumman of the danger, and Garrett was negligent if it failed to do so.

In order for any of the plaintiffs to recover from defendant Garrett on plaintiffs' claim that negligent failure to warn by Garrett caused the tailpipes to collapse in flight, you must find that the tailpipes did collapse in flight and that both of the following have also been proved:

1. Defendant Garrett was negligent in that it failed to exercise reasonable care to test the engines and warn Dassault or Grumman so that the engines and the tailpipes would not create an unreasonable risk of harm to person or property while the aircraft was being used in the manner defendant Garrett should reasonably have expected; and

2. The accident was caused by defendant Garrett's negligence while the aircraft was being used in the manner that Garrett should reasonably have expected.

If you find that either or both of these two propositions has not been proved by a preponderance of the evidence, then your verdict on this claim must be for the defendant, Garrett.

On the other hand, if you find that both of these propositions have been proved by a preponderance of the evidence, then your verdict on this claim must

> be for the plaintiffs, unless you should also find by a preponderance of the evidence that Mountain Bell and the aircraft crew were negligent in failing to maintain the aircraft properly, failing to train the crew properly, or failing to operate the aircraft properly. In any event, you shall answer the questions contained on Special Verdict Form A, and your foreperson shall complete it and all jurors shall sign it.

[R., App. Vol IX, pp. 20-22].

Appellants argue here that these instructions constituted plain error because they precluded the jury from finding the Defendants negligent *even as to the passengers* if the jury found *contributory* negligence on the part of the pilots or Mountain Bell. Appellants contend that Colorado jury instruction (CJI-CIV. 2d 14:1, 1980 and 1981 supplement) and Colorado's law of comparative negligence requires that only affirmative defenses *other than contributory negligence* can bar the finding of negligence on the part of a defendant.

We hold that appellants have not met the burden to support the "plain error" exception to Rule 51, *supra*. The totality of these instructions when read in conjunction with the interrogatories contained in Special Verdict Form A support the view that the jury could not find *any causal* negligence on the part of any defendant and, further, *no causal* negligence on the part of any plaintiff. This, *of course*, explains why the jury did not answer question 13 which was directed to the determination of comparative fault. There could not be any comparative fault when there was no finding of causal negligence against any party. We see no merit in appellants' argument that because the jury found Mountain Bell negligent, even though this negligence had no causal relationship to the accident, that such negligence could have, in the jurors' minds, fulfilled the contributory negligence clause contained in the instructions. This possibility is speculative, hypothetical, and without foundation in the evidence to support a "plain error" exception to Rule 51.

The instructions of the court, when considered as a whole, as they must be, were thorough and adequate. The trial court meticulously advised the jurors to consider the instructions as a whole and not to single out one instruction. [R., App. Vol. VIII, p. 169]. In *Commercial Iron & Metal Co. v. Bache Halsey Stuart, Inc.*, 581 F.2d 246, 250 (10th Cir. 1978), *cert. denied*, 440 U.S. 914 (1979) we said "No single instruction can tell you everything, but you (the jurors) have to consider the totality of all the instructions." Furthermore, the trial court carefully explained plaintiffs' claims against each defendant and the two legal theories relied upon, negligence and products liability. The court likewise, by Instruction 34, instructed the jury on the Colorado comparative negligence law pursuant to § 13-21-111, C.R.S. 1973. That instruction included this language:

> If you find that the accident was caused by the negligence of one or more of the defendants, then you must determine whether one or more of the plaintiffs was also negligent and determine to what extent the negligent conduct of each negligent party, whether the party is a plaintiff or a defendant, contributed to cause the accident, expressed as a percentage of one hundred percent.

[R., App. Vol. IX, p. 24].

The trial court orally advised the jury of the comparative negligence instruction and its relationship to Special Verdict Form A. The jury was, on the basis of the totality of instructions, more than adequately advised of the negligence claims and the applicable Colorado law. Assuming, arguendo, that Instructions 27A, 29 and 30 were erroneous, such error was harmless. This is so because the jury found no causal negligence on the part of any defendant. It was for this reason that there was no jury finding of contributory or comparative negligence.

II.

Appellants contend that the trial court erred in its instructions relating to plaintiffs' claims for sale of a defective product against appellees Falcon Jet Corporation and Garrett. The appellants do not challenge the instructions in this regard against AMD. We hold that when the court's instructions on plaintiffs' claims for liability for sale of a defective product are considered as a whole, no error occurred. Instructions 21 and 39 through 49, coupled with Special Verdict Forms B-1 through B-11 clearly and correctly instructed the jury on the strict product liability claims [R., App. Vol. IX, pp. 26-36].

Colorado has adopted the *Restatement (Second) of Torts* § 402A (1965) in its entirety, as the basis for strict liability for the sale of a defective product. The Restatement doctrine was expressly adopted in *Hiigel* v. *General Motors Corporation*, 544 P.2d 983 (Colo. 1976) and was stated as follows:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold,
>
> (2) The rule stated in Subsection (c) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

> (b) the user or consumer has not bought the product from or entered into contractual relation with the seller."

544 P.2d at pp. 986, 987.

Hiigel further stated:

> Under § 402A, a product must be defective before liability will inure. The major issue to be addressed by this court is whether a failure to warn adequately can render a product, otherwise free of defect, defective for purposes of § 402A. We answer this question in the affirmative. *Restatement (Second of Torts*, § 402A, Comment j, states:
>
> "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use."

544 P.2d at p. 987.

See also, Anderson v. *Heron Engineering Co.*, 604 P.2d 674 (Colo. 1979); *Union Supply Company* v. *Pust*, 583 P.2d 276 (Colo. 1978); *Good* v. *Chance Co.*, 565 P.2d 217 (Colo. App. 1977).

The plaintiffs alleged that AMD was liable for sale of a defective product on various theories, including design defect and inadequate operating instructions as to the plane, the hydraulic system, the engines, the autopilot and the Arthur Q system. These theories were fairly and correctly submitted to the jury and the jury found in favor of AMD. [R., App. Vol. VIII, pp. 240-243; Special Verdict B-1, B-4, B-6 and B-9].

With regard to the defective product claim lodged against Falcon Jet, plaintiffs alleged a failure to warn and a failure to provide adequate operating instructions [R., App. Vol I, Pretrial Order; Instructions 39 and 43]. Appellants argue that even though AMD sold the Falcon 10 to Falcon Jet and even though the jury did not find AMD liable for sale of a defective product, still Falcon Jet, as seller of the plane to

Mountain Bell and installer of the autopilot, could be liable on the same theory had the proper instruction been given. Appellants point to the installation of a defective autopilot by Falcon Jet as the basis for an instruction permitting the jury to determine that Falcon Jet sold Mountain Bell a defective airplane. Instruction 43 did, however, instruct that plaintiffs had the burden of proving that the Falcon 10 airplane was defective at the time it was sold by Falcon Jet. The Special Verdict forms tendered clearly applied the "sale of a defective product" language to Falcon Jet. In addition, Instruction 39 identified a claim that Falcon Jet sold a defective product. The trial court, out of an abundance of caution, was very generous to appellants because the only claim advanced by plaintiffs against Falcon Jet in strict liability was anchored to Falcon Jet's failure to warn. [R., Vol. 2, Pre-trial Order, Theory No. V., pp. 235-237]. The pre-trial order governs the trial and it "measures the dimensions of the lawsuit, both in the trial court and on appeal." *American Home Assur. Co.* v. *Cessna Aircraft Co.*, 551 F.2d 804, 806 (10th Cir. 1977), *quoting, Hodgson* v. *Humphries*, 454 F.2d 1279, 1281 (10th Cir. 1972). *See also, Smith* v. *Ford Motor Co.*, 626 F.2d 784 (10th Cir. 1980), *cert. denied*, 450 U.S. 918 (1981). Plaintiffs did not object to Instruction 40 which defined a defective product and specifically stated that "this instruction does not apply to Plaintiffs claims against Defendant Falcon Jet Corporation because Plaintiffs are not claiming that Falcon Jet Corporation had any responsibility for the design or manufacture of the Falcon 10 airplane." [R., App. Vol. IX, p. 29]. No plain error occurred in its submission because Plaintiffs alleged only failure to warn on the part of Falcon Jet, not design defect. Thus, they were entitled only to the failure to warn instructions given. No error occurred.

Again, as to Garrett Corporation, plaintiffs alleged that the trial court erred in failing to give an instruction for sale of a defective product in that there was testimony that 1) Garrett manufactured and sold the engines which surged and caused tailpipe collapse, and 2) Garrett manufactured and

sold engines but failed to develop internal pressure information necessary for the design of the tailpipes attached to the engines, and that this was a cause of the crash. This claim is without merit. The trial court correctly submitted, through Instruction 44, the only theory finding any support in the evidence, i.e., failure to provide sufficient warnings or instructions for the product's use. The only evidence justifying even this instruction were indications that Garrett should have provided information with regard to pressures developed by the engines during surge so that the airframe manufacturer would be advised of the manner of designing a tailpipe adequate to withstand those pressures. It is error to give an instruction on a theory which does not have sufficient evidence in the record supporting its submission to the jury. *United Telecom* v. *American Tel. & Comm. Corp.*, 536 F.2d 1310 (10th Cir. 1976). No error occurred with regard to the challenged instructions relating to Garrett.

III.

Appellants allege that the trial court erred by instructing the jury on the defenses of assumption of the risk and misuse as to the claims of all the Plaintiffs. The challenged instructions are Nos. 45 and 46.

Appelants complain that, as a matter of law, assumption of risk was not available as a defense regarding passengers Whistler, Anderson and Miles, inasmuch as there is no evidence, as required by Colorado product's liability law, that they had subjective knowledge of the danger or that they voluntarily and unreasonably encountered a known danger. *Union Supply Co.* v. *Pust, supra; Good* v. *A. B. Chance and Co., supra.* On this predicate, appellants argue that to justify an assumption of risk and misuse instruction against *all* the plaintiffs, the Defendants were required to introduce substantial evidence that the passengers had actual knowledge of the specific danger caused by the defective design of the Falcon 10 aircraft.

Appellants acknowledge that Richard Bucknell's testimony constituted some evidence, which they identify as "the only evidence" [Appellants' opening Brief, p. 15] concerning the knowledge of Kenneth Moe and Mountain Bell relating to the effect of manual flight when the autopilot is engaged. Apellants contend that the Bucknell experience was temporary in nature and cannot be equated with catastrophic loss of control of an airplane for a period of several minutes. As to Rodney Renzelman's knowledge of the autopilot defect, appellants contend that the only evidence is that he may have known that there had been intermittent malfunction of the disengage button on the yoke.

Appellants, again, did not raise the objections here posited to Instructions 45 and 46 before the jury retired. Thus, they did not comply with the requirements of Rule 51, *supra*. Plaintifs argued only that the evidence was insufficient to support these instructions. When the trial court ruled on Plaintiffs' post-trial motions, i.e., for judgment notwithstanding the verdict and for new trial, it dealt directly with the contention that it erred by failing to strike the affirmative defenses. The court stated that (a) there was no error when the jury instructions are considered as a whole, (b) the plaintiffs' objections were untimely in that plaintiffs did not at any time tender language distinguishing among the plaintiffs either in regard to the jury instructions or the motion to strike the affirmative defenses, and (c) counsel for plaintiffs made no effort to distinguish among the rights and duties of the passenger-plaintiffs and the other plaintiffs. Finally, and in our view decisive of the contention here presented, the trial court pointed to Instruction 37 regarding imputation of negligence which, in part, read:

> The negligence, if any, of Mountain Bell, Kenneth Moe [pilot] or Rodney Renzelman [co-pilot] is not chargeable to plaintiff Beverly L. Miles or to the Anderson plaintiffs or the Whistler plaintiffs [passengers].

[R., App. Vol. IV, pp. 149, 150].

No error occurred in the trial court's submission of Instructions 45 and 46 when read in context.

IV.

Appellants argue that the trial court erred in accepting the jury verdicts because they are inconsistent with every theory that the experts testified to at trial, and that the jury's answers to interrogatories show that it did not understand the instructions or the evidence. Appellants contend that:

> "through their refusal to choose between the two theories presented by the expert testimony, the jury was in essence expressing a lay opinion as to the cause of the crash which was different from the experts' opinions. While the experts' opinions were that the cause was determinable, the jury's verdict expressed a lay opinion that the cause was unknown. The jury should not be allowed to express such a lay opinion as to cause. *Curtis* v. *General Motors Corp.*, 649 F.2d 808, 813 (10th Cir. 1981). The jury is not at liberty to disregard arbitrarily the unimpeached testimony of expert witnesses when the testimony bears on technical issues of causation beyond the competence of lay determination. *Webster* v. *Offshore Food Service, Inc.*, 434 F.2d 1191, 1195 (5th Cir. 1970) (citing *Bearman* v. *Prudential Ins. Co. of America*, 186 F.2d 662, 665 (10th Cir. 1951)." [Opening Brief of Appellants, p. 21].

We have reviewed *Curtis*, *supra*, and *Webster*, *supra*. These cases stand for the rule that a jury may not express a lay opinion as to the cause of injury when expert witnesses were unable to do so. These cases do not stand for the proposition, as appellants seem to imply, that a jury must accept expert opinions, *ipso facto*.

The answers given by the jury on the negligence claims, accompanying Instructions 21-38 and Special Verdict Form A were as follows:

We, the jury, present our answers to questions presented by the Court, to which we have unanimously agreed:

1. Was the defendant, Avions Marcel Dassault-Breguet Aviation, negligent? (Yes or No)

   Answer: No.

2. Was the negligence, if any, of the defendant, AMD, a cause of the accident? (Yes or No)

   Answer: No.

3. Was the defendant, Falcon Jet Corporation, negligent? (Yes or No)

   Answer: No.

4. Was the negligence, if any, of the defendant Falcon Jet Corporation, a cause of the accident?
   (Yes or No)

   Answer: No.

5. Was the defendant, The Garrett Corporation, negligent? (Yes or No)

   Answer: No.

6. Was the negligence, if any, of the defendant, The Garrett Corporation, a cause of the accident? (Yes or No)

   Answer: No.

7. Was Kenneth L. Moe negligent? (Yes or No)

   Answer: No.

8. Was the negligence, if any, of Kenneth Moe a cause of the accident? (Yes or No)

   Answer: No.

9. Was Rodney Renzelman negligent? (Yes or No)

Answer: No.

10. Was the negligence, if any, of Rodney Renzelman a cause of the accident? (Yes or No)

Answer: No.

11. Apart from the negligence, if any, of Kenneth Moe and Rodney Renzelman, was plaintiff Mountain Bell negligent in any other or additional respect? (Yes or No)

Answer: Yes.

12. Was this other or additional negligence, if any, of Mountain Bell a cause of the accident? (Yes or No)

Answer: No.

[R., App. Vol. VIII, pp. 239, 240].

The jury did not answer interrogatory 13. It asked for the jury's determination of comparative negligence. There was, of course, no basis for answering it inasmuch as the jury had found no negligence on the part of any defendant.

Fed. Rules Evid. Rule 702, 28 U.S.C.A. provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The purpose of admitting the testimony of an expert witness is, of course, to assist the jurors in understanding the evidence or to determine a fact in issue. It remains the duty of the jury to evaluate the testimony of expert witnesses, just as all other witnesses, and to reach conclusions as to its worth and weight. Our entire jury system is anchored to the jurors'

determination of credibility of witnesses and the weight to be given their testimony.

Our analysis of the jury's verdict convinces us that the jury was not persuaded that the Defendants were negligent and that, additionally, there was failure to prove causation by the plaintiffs. The plaintiffs, of course, shouldered that burden. By the same token, the jury was not convinced that Plaintiffs Mountain Bell or the pilot crew were causally negligent in flying the aircraft. Under these circumstances, we hold that the verdicts and the jurors' responses to the interrogatories are consistent. Neither party convinced the jury of the cause of the crash of the Falcon 10. While the jury was free to accept various theories of the cause of the crash, it obviously was not persuaded that the evidence established a definitive cause. Accordingly, the verdicts reflect the jury's determination that the Plaintiffs failed, by a preponderance of the evidence, to establish a theory of negligence or causation. The interrogatories were clear and concise. They were directed to contested issues of fact. The jury did not find causal negligence on *any* theory presented at trial because the jury was not persuaded that *any* theory had been established by a preponderance of the evidence. This does not render the jury's verdict "inconsistent." There is no rule *requiring* the jury to accept one of several expert postulations on causation. Expert witness testimony is subject to the same tests of credibility and weight as is any other admissible evidence.

The burden of proof was upon the Plaintiffs to establish their case by a preponderance of the evidence. *See* Instruction 17. The trial court, by Instruction 25, advised the jury that any finding of fact must be based on probabilities, not possibilities, surmise, speculation or conjecture and that the occurrence of an accident does not raise any presumption of negligence on the part of any plaintiff or any defendant. The jury did not find, by a preponderance of the entire evidence, that the crash was caused by negligent design or negligent failure to warn on the part of the Defendants, that the pilots were negligent, or that Mountain Bell's negligence was the

cause of the crash. Thus, insofar as the jury was concerned, the *cause* of the crash remained unknown. The jury verdict was true to the trial court's admonishment that no finding may be based on surmise, speculation or conjecture.

V.

Appellants argue that the trial court committed reversible error by denying admission into evidence of Plaintiffs' Exhibit 19, "Newsflash 16," which appellants claim constituted evidence of the need for a warning regarding the insidious danger presented by the autopilot in the Falcon 10. This contention challenges the trial court's interpretation and application of Fed. Rules of Evidence, Rules 407 and 403.

The proferred Exhibit 19 "Newsflash 16" was published by AMD on March 1, 1978, after the crash of the Falcon 10 and reads in pertinent part as follows:

> In the Autopilot engaged configuration, the autopilot may fail to disengage when the pilot presses the switch in the control wheel.
>
> * * *
>
> A refusal of the Autopilot to disengage, *not perceived* by the pilot, constitutes an insidious failure which may result in a situation similar to the situation resulting from an Horizontal Stabilizer trim runaway. Under the action of the Automatic Trim, the Horizontal Stabilizer moves in a direction opposed to that commanded by the pilot. Such a motion is identified by a slow sounding of the clacker.
>
> Since such a motion can be stopped by the Horizontal Stabilizer normal control, only if the counteraction is maintained, is it advisable to:
>
> 1. Rapidly use the emergency Horizontal Stabilizer trim control. Only this action can definitely

> stop such an Horizontal Stabilizer motion. Exhibit 19 (R. vol. 80) (*Emphasis in original.)*

[R., App. Vol. IX, p. 66, Exhibit 19].

Prior to trial the court expressed its views that Exhibit 19 would not likely be admitted inasmuch as Plaintiffs alleged causes of action based both on negligence and strict liability and the policy underlying Fed. R. Evid. 407, was not to discourage persons from taking remedial measures. The trial court recognized, however, that its ruling would be guided by the balancing under Fed. R. Evid. 403.

Rule 407 reads:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligent or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The feasibility of warning about the autopilot disengagement problem in the Falcon 10 prior to the crash was not controverted.

Rule 403, Fed. Rules of Evidence reads:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Appellants argue that the trial court erred in applying Rule 407, *supra*, in light of the law of Colorado then controlling as set forth in *Good* v. *A. B. Chance Co.*, *supra*, which followed the reasoning of *Ault* v. *International Harvester*,

528 P.2d 1148 (Cal. 1974). *Good* held, in a products liability action, that evidence of a manufacturer's post-accident warning had a direct bearing on liability as tending to establish knowledge of the defect, feasibility of giving warnings, duty to warn, and breach of that duty. The *Good* v. *Chance* court referred to *Hiigel* v. *General Motors Corp.*, *supra*, for the rule that failure to warn may render a product defective when that failure is a proximate cause of the injury, but it also relied on *Hiigel* for the rule that, "[a] affirmative defense in a products liability case exists when it can be shown that the injured party knew of the dangerous defect in the product and voluntarily and unreasonably encountered the known danger it presented." 565 P.2d at pp. 222, 223.

The trial court ruled that Rule 407, *supra*, is not governed by or made applicable by state law. On this predicate, the court did not view the *Good* decision as binding. The trial court stated that Rule 407 should not discourage defendants to take remedial measures following an accident. We respectfully disagree with the trial court's conclusion that the admissibility of evidence in diversity actions is governed exclusively by federal law — that is, the Federal Rules of Evidence. Even so, such considerations do not affect the outcome of the instant case. In *Rexrode* v. *American Laundry Press Co.*, 674 F.2d 826, 831 (10th cir. 1982), *cert. denied*, U.S., we held that in a diversity based products liability case, in the absence of state law holding otherwise, state evidentiary law will be applied to determine admissibility of subsequently promulgated industry standards. We there noted that no Kansas court had previously addressed the issue; thus, our court was required to determine what the result would be if the question were litigated in state court.

Herndon v. *Piper Aircraft Corporation*, F.2d (No. 81-1805, 10th Cir., 1983), was a diversity case arising under the laws of New Mexico involving a defectively manufactured Piper aircraft. We did not there decide whether Rule 407 is procedural and thus strictly a matter of federal law or substantive if the situs state had announced a product liability

policy binding on the federal court. In *Herndon*, we observed that "[n]o New Mexico court has yet addressed the issue of admissibility of subsequent repair evidence in a strict liability case." This court proceeded to apply "the federal rule" which permitted the admission of subsequent remedial conduct where the feasibility of repair had not been stipulated, and the probative value of the evidence of post-accident remedial conduct outweighed any possible prejudice under Rule 403. *Herndon* reviewed the decisions of the various courts, federal and state, relating to Rule 407 and its state counterparts. We there observed that only the Eighth Circuit had explicitly held, as did *Herndon*, that Rule 407 does not exclude post-accident remedial measures in product liability cases. Four circuit courts had held otherwise. We noted that while there is also a split of authority among the states, far more state courts have recognized that Rule 407, or its state equivalent, does not apply in strict liability cases.

It is our view that when state courts have interpreted Rule 407 or its equivalent state counterpart, the question whether subsequent remedial measures are excluded from evidence is a matter of state policy. *See, Rexrode* v. *American Laundry Press Co.., supra*. The purpose of Rule 407 is not to seek the truth or to expedite trial proceedings; rather, in our view, it is one designed to promote state policy in a substantive law area. *See*, comments of Professor Schwartz, Vol. 2, Weinstein's Evidence, Rule 407, 407-1, 2 (1982). For example, the State of Maine has adopted a rule of evidence which repudiates the rule of exclusion with regard to subsequent remedial repairs. This creates a conflict between Rule 407 and the Maine rule. We hold that when such conflicts arise, because Rule 407 is based primarily on policy considerations rather than relevancy or truth seeking, the state rule controls because (a) there is no federal products liability law, (b) the elements and proof of a products liability action are governed by the law of the state where the injury occurred and these may, and do, for policy reasons, vary from state to state, and (c) an announced state rule in variance with Rule 407 is so closely tied to the substantive law to which it relates (product

liability) that it must be applied in a diversity action in order to effect uniformity and to prevent forum shopping. *Rexrode* v. *American Laundry Press Co., supra.* We are not unmindful of the rule laid down in *Hanna* v. *Plummer*, 380 U.S. 460 (1965), that where the federal and state rules both govern the issue in dispute and are in direct conflict, the federal rule applies in a diversity based case if the federal rule is arguably procedural in nature. However, we observe that while the sufficiency of the evidence is tested against the federal standard in a diversity case, *Hidalgo Properties, Inc.* v. *Wachovia Mortgage Co.*, 617 F.2d 196, 198 (10th Cir. 1980), the underlying cause of action, with its attendant elements and requirement of proof in a diversity case, is governed by state law. *Safeway Stores* v. *Fannan*, 308 F.2d 94, 97 (9th Cir. 1962). The ground for exclusion of remedial measures under Rule 407 rests on the social policy of encouraging people to take steps in furtherance of safety. The decision is necessarily a state policy matter. Product liability is not a federal cause of action but, rather, a state cause of action with varying degrees of proof and exclusion from state to state. If a state has not announced controlling rules, such as New Mexico, *(Herndon, supra)* the federal district court, sitting as a state court in a product liability diversity case, must determine whether Rule 407 applies. Where the state law is expressed in product liability cases, these expressions control the application of Rule 407. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). If the law of the state supplies the rule of decision, there is no justification for reliance on Rule 407. We recognize that, by its terms, Rule 407, when read in conjunction with Rules 401 and 402, does appear to apply in these cases. However, such a result is an unwarranted incursion into the *Erie* doctrine. Louisell and Mueller, Federal Evidence, Vol. 2, §166, p. 258. The crux of this conclusion is well stated, as follows:

> The constitutional meaning of the *Erie* doctrine seems to be this: The enumerated powers set forth for the Congress in Article II and for the Judiciary in Article III are by implication limited powers, and the notion of limited federal authority is reinforced

> by the Tenth Amendment. Therefore, the federal judiciary may not "find" or "create" general law to resolve controversies merely because they are litigated in federal court. One difficulty in advancing such an argument against the application of Rule 407 lies in the fact that the constitutional boundaries of congressional power, where there are competing state rules, have not been clearly defined . . . Although *Erie* itself holds that there is no federal general common law of torts, nothing in the case suggests Congress could not pass a statute governing the rights of the parties on the very facts of *Erie* . . . Despite the problems noted . . . there may well be valid constitutional reasons why Rule 407 cannot be applied in cases where state law supplies the rule of decision. Even if Congress *could* constitutionally enact statues to govern the rights of parties in a given instance, it does not necessarily follow that the Congress, in codifying the law of evidence, may constitutionally enact a narrow statute governing a single substantive issue in a lawsuit which is otherwise to be resolved by reference to state law . . . It is unlikely that the Congress intended, in enacting Rule 407 along with the other rules, to make any incursion whatsoever in the *Erie* doctrine. [Footnotes omitted].

Louisell and Mueller, Federal Evidence, Vol 2. § 166, pp. 261-264.

Notwithstanding our view that the trial court erred in ruling that Fed. Rule of Evid. Rule 407 applies in diversity actions without regard to state law, we hold that no harm resulted therefrom because the trial court's actions were proper and correct on other grounds. The Colorado decisions of *Good* v. *A.B. Chance Co., supra,* and *Roberts* v. *May,* 583 P.2d 305 (Colo. App. 1978) controlled at the date of the Falcon 10 crash. Regardless of the trial court's Rule 407 ruling, the court fully and adequately instructed under the theories

announced in those cases and the theories advanced by the plaintiffs, i.e., sale of a defective product and failure to warn. Furthermore, the trial court *expressly* excluded the "Newsflash 16" from evidence based on the balancing factors set forth in Rule 403. Colorado has adopted Colo. Rules of Evidence, Rule 407 (1980), which is identical to federal Rule 407. The Committee comment indicates an intent to exempt strict liability actions from application of the Rule. However, the Colorado legislature, by enactment of § 13-21-404, C.R.S. 1973 (1982 Supp.) limited evidence of subsequent measures except when attempting to show a duty to warn. The statute reads:

> In any product liability action, evidence of any scientific advancements in technical or other knowledge or techniques, or in design theory or philosophy, or in manufacturing or testing knowledge, techniques, or processes, or in labeling, warnings or risks or hazards, or instructions for the use of such product, where such advancements were discovered subsequent to the time the product in issue was sold by the manufacturer, *shall not be admissible for any purpose other than to show a duty to warn.* [Emphasis supplied].

Following the enactment of § 13-21-404, together with §§ 13-21-401 through 405, the Colorado legislature, in our view, substantially "watered down" the impact of *Good* v. *A.B. Chance Co., supra,* and *Roberts* v. *May, supra.* Under this statutory scheme a product is not to be found defective if, at the time of its sale, it either conforms with the state of the art or complies with applicable state and federal statutes and regulations. *See,* § 13-21-403(1)(a) and (b). This legislative scheme is, at least, outcome determinative in the substantive-policy sense. As such, it must be elevated over federal Rule 407 in a diversity-based action. However, this legislative scheme was not in effect at the date of the Falcon 10 crash. It does demonstrate, however, that the substantive state law of

product liability is deeply involved in legislative policy determinations. In the instant case, the rules set down in *Good* and *Roberts* controlled.

The feasibility of warning about the failure of the autopilot on the Falcon 10 airplane to disengage was not controverted. With this in mind, the trial court ruled that Exhibit 19 evidencing subsequent remedial measures would be confusing to the jury and prejudicial under Rule 403; furthermore, the court found that the relevancy and probative value of the subsequent remedial measures were low under Rule 401. The court stated that as to both the strict liability and negligence claims, Exhibits 19, 20, and 47 would be admitted only when offered to prove ownership, control or feasibility of precautionary measures in controverted. [R., App. Vol. IV, pp. 192, 193]. These rulings were reaffirmed when the court denied plaintiffs' motion for reconsideration. [R., App. Vol. IV, pp. 201-203]. The court, even though rejecting *Good* v. *Chance, supra,* on policy reasons under Rule 407 which the court construed as binding it to the Federal Rules of Evidence "even in diversity cases", nevertheless *expressly* excluded the evidence "under 403 because of unfair prejudice and jury confusion, and balancing that we have endeavored to do under Rule 403." [R., App. Vol. IV, pp. 202, 203]. The trial court's balancing process carefully observed that because this case involved *both* claims in negligence and strict product liability, coupled with the evidence that Mountain Bell and the pilot crew of the Falcon 10 which crashed had prior *actual warning* of the danger involved in manual flight while the autopilot is engaged, Rule 403 considerations of prejudice, and jury confusion substantially outweighed the probative value of Exhibit 19 and warranted its exclusion. Colorado has long applied a similar rule. The sufficiency, probative effect, and weight of all evidence, and the inferences and conclusions to be drawn therefrom, are within the province of the trial court (or jury) and findings and conclusions will not be disturbed on appeal unless clearly erroneous. *Dominion Ins. Co.* v. *Hart,* 498 P.2d 1138 (Colo. 1972); Rule 43, C.R.C.P., C.R.S. (1973), 7 A. The trial court must weigh

the probative value of evidence against its prejudicial effect and relevancy and this involves the exercise of the trial court's discretion. *Simonton* v. *Continental Cas. Co.*, 507 P.2d 1132 (Colo. App. 1973). Facts supporting only conjectural inferences have no probative value and should not be admitted in evidence. *Dolan* v. *Mitchell*, 502 P.2d 72 (Colo. 1972). Rule 61, C.R.C.P., C.R.S. (1973), Vol. 7 A provides that no error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any party is ground for a new trial or for setting aside a verdict or judgment unless the refusal to take such action appears to the court inconsistent with substantial justice. This is Colorado's "Harmless Error" rule. Fed. R. Evidence, Rule 103(a) blends with the above rules. It provides that error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Colo. Rules of Evidence, Rule 103 (1980) is to the same effect.

We thus hold that the trial court did not abuse its discretion and did not err in denying admission of Plaintiffs' Exhibit 19 into evidence. Furthermore, we see no merit in plaintiffs' contention that the trial court erred in refusing the admission of Exhibit 19 for purposes of impeachment of defendants' pilot experts, Le Prince-Reuguet and Ronald Schwenkler. When these witnesses were cross-examined by counsel for plaintiffs, the court permitted counsel to paraphrase the language of Exhibit 19 for impeachment purposes. During cross-examination of Mr. Le Prince-Reuguet, this colloquy took place:

> MR. ULLSTROM (counsel for plaintiffs):
>
> Q. Based on your own experience, sir, as a test pilot do you not have the feeling that a refusal of the autopilot to disengage not perceived by the pilot constitutes an insidious failure which may result in a situation similar to the situation resulting from a horizontal stabilizer trim runaway?

A. That's why I say yes. That's why you use the same procedure.

Q. You agree?

A. I agree.

[R., App. Vol. VI, pp. 230, 231].

When Mr. Schwenkler testified on direct examination, he stated that in his opinion the Falcon pilot crew did not know that the autopilot was engaged when they attempted to fly manually; he stated that there were many ways for the crew to confirm that the autopilot had not disengaged. [R., App. Vol. VII, pp. 19-28]. On cross-examination, when asked whether he agreed that refusal of the autopilot to disengage on a Falcon 10 was an insidious failure, he responded "no" and thereafter he stated his disagreement with Mr. Le Prince-Reuguet that the failure to disengage should be considered a "hidden failure". [R., App. Vol. VII, pp. 39, 40]. Plaintiffs did not make further requests for the use of Exhibit 19 for impeachment of Mr. Schwenkler. This portion of the record demonstrates, in our view, that the trial court did permit plaintiffs to effectively employ the crux of Exhibit 19 for impeachment purposes and that, therefore, the plaintiffs were not unfairly prejudiced by the exclusion of the exhibit from evidence.

VII.

We have carefully examined the balance of plaintiffs-appellants' contentions of error. We hold that they are without merit. These contentions, for the most part, challenge the trial court's denial of admission into evidence various testimony or documents. We have reviewed the record and hold that no prejudicial error was committed. The court carefully analyzed each issue and found that the probative value was outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury. Further, the court correctly

observed that certain tenders of evidence of other flight incidents, after the crash of Falcon 10, would constitute a minitrial within a trial, resulting in undue delay, waste of time, and needless presentation of cumulative evidence. Rule 403; *Rigby* v. *Beech Aircraft Corp.*, 548 F.2d 288 (10th Cir. 1977) [applying Rule 403 in a products liability action]. Furthermore, the trial court correctly found that similarity of proof of causation was lacking, citing to *Julander* v. *Ford Motor Co.*, 488 F.2d 839 (10th Cir. 1973).

We find no merit in the contentions that the trial court erred in (1) allowing alleged prejudicial misrepresentations by defendants' counsel to go uncured, and (2) prejudicing the plaintiffs by bifurcation of the trial. With regard to plaintiffs' contention that the trial court erred in dismissing plaintiff Beverly L. Miles' punitive damages claim, we need not decide whether the trial court erred in applying the one-year statute of limitation set forth in §13-80-104, C.R.S. 1973. Section 13-21-102, C.R.S. 1973 provides, in pertinent part:

> In all civil actions in which damages are assessed by a jury for a wrong done to the person . . . and the injury complained of is attended by circumstances of . . . a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

Obviously, §13-21-102 has no application in the absence of an underlying award of actual damages. *Harding Glass Co.* v. *Jones*, 640 P.2d 1123 (Colo. 1982). Here, the jury did not find for the plaintiffs on the issue of liability, a prerequisite for an award of damages.

Turning now to AMD's cross appeal, we hold that the trial court did not abuse its discretion in refusing to tax as costs for AMD the reasonable and necessary costs of partial daily transcripts, exhibits used at trial, travel expenses of experts and French company employees beyond one hundred

miles, and depositions used but not read at trial, in total amount of $20,654.21. In addition, Falcon Jet cross appeals from the disallowance of costs of $8,310.05 and Garrett Corporation cross appeals from the denial of an award of costs in the approximate sum of $22,679.95. Defendants contend that the trial court did not give its reasons for disallowing these costs, in violation of *Delano* v. *Kitch*, 663 F.2d 990 (10th Cir. 1981), *cert. denied*, —U.S.—(1982). In *Delano* we held that because Fed. R. Civ. P. Rule 54(d) 28 U.S.C.A. provides that costs shall be allowed as a matter of course to the prevailing party unless the court directs otherwise, it is incumbent upon the trial court, should it refuse to award costs to the prevailing party, to state its reasons so that the appellate court will have a basis for judging whether the trial court acted within its discretion. In the case at bar we are not adrift. The trial court set forth adequate reasons for modification of taxation of costs in its order of February 8, 1982. [R., App. Vol. IV, pp. 153-157]. The trial court did not abuse its discretion in disallowing costs of daily transcripts in the amount of $11,817.55, photographer's fees for the preparation of Exhibits 222-25 through 31 in the amount of $949.80, negatives in the amount of $174.00, photocopies used in the juror notebooks (except those copies actually used by the jury) in the amount of $318.75, transcripts of hearings and conferences, pretrial, and other conferences, and, depositions except for those actually read into evidence. The court reaffirmed its 100-mile rule for transportation costs of witnesses and allowed costs for travel for one trip only. The trial court's order is in line with the general costs statute, 28 U.S.C. § 1920. That statute, among other things, allows fees of the court reporter for any stenographic transcript necessarily obtained "for use" in the case and fees for exemplification and copies of papers necessarily obtained "for use" in the case. The trial court's discretion with regard to what costs in the taking of depositions are reasonably necessary to the litigation will not be disturbed on appeal unless abused. We find no abuse of discretion by the trial court in modifying taxation of costs.

WE AFFIRM.

Nos. 82-1256
82-1257
82-1258
82-1259

MOE et al.

v.

AVIONS MARCEL DASSAULT-
BREGUET AVIATION et al.

McKAY, Circuit Judge, concurring:

I concur in result and in the opinion of the court except to the extent that it purports to resolve the difficult question of possible conflict between state and federal rules of evidence. As the court's opinion makes clear, that discussion is not necessary to our decision which properly rests on the independent ground of balancing mandated by Rule 403 and parallel state authority.

APPENDIX B

Civil Action No. 79-F-352

JUDGMENT

IN THE

United States District Court

FOR THE DISTRICT OF COLORADO

DOLORES E. MOE, ERIC R. MOE, KRIS L. MOE AND LEIF A. MOE; JUDY ELAINE RENZELMAN, INDIVIDUALLY, AND AS CONSERVATOR AND NEXT FRIEND OF MINOR BRAD ALLEN RENZELMAN; ELAINE L. WHISTLER, PAUL W. WHISTLER, DIANE WHISTLER AWALT; JOAN ELAINE ANDERSON, INDIVIDUALLY, AND AS GUARDIAN AD LITEM AND NEXT FRIEND OF MINORS ELIZABETH JOAN ANDERSON AND CHRISTOPHER ANDREW ANDERSON; BEVERLY L. MILES; THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, A COLORADO CORPORATION,

Plaintiffs,

vs.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, FALCON JET CORPORATION AND THE GARRETT CORPORATION,

Defendants.

This matter having come on regularly for trial on the 3rd day of November, 1981, before the Court and a jury of twelve persons duly sworn to try the issues herein, The Honorable Sherman G. Finesilver, Judge presiding.

The trial proceeded to conclusion and the jury duly rendered its special verdict in the form of interrogatories in favor of the defendants on the claims of negligence. The summary of the special verdict was that the defendant, Avions Marcel Dassault-Breguet Aviation was not negligence: that the defendant, Falcon Jet Corporation, was not negligent; that

the defendant, The Garrett Corporation, was not negligent; that Kenneth L. Moe was not negligent; that Rodney Renzelman was not negligent, further that apart from the negligence, if any, of Kenneth Moe and Rodney Renzelman the plaintiff Mountain Bell was negligent and that this negligence of Mountain Bell was not a cause of the accident.

On the claim of the sale of a defective product the jury found for each defendant and against each of the respective plaintiffs. It is, therefore

ORDERED AND ADJUDGED that judgment is entered in favor of the defendants and against the plaintiffs. The Complaint and action are dismissed and defendants are to recover their costs upon the filing of a Bill of Costs with this Court within ten (10) days after entry of this Judgment.

DATED at Denver, Colorado, this 11th day of December, 1981.

FOR THE COURT:
JAMES R. MANSPEAKER,
CLERK

By: /s/ Stephen P. Ehrlich
Stephen P. Ehrlich,
Chief Deputy Clerk

APPROVED: /s/ Sherman G. Finesilver
Sherman G. Finesilver

APPENDIX C

MARCH TERM — April 2, 1984

Nos. 82-1256
82-1257
82-1258
82-1259

DOLORES E. MOE, ET AL.,
Plaintiffs-Appellants and Cross-Appellees,
v.

AVIONS MARCEL DASSAULT-BREGUET AVIATION, ET AL.,
Defendants-Appellees and Cross-Appellants.

Before
Honorable Oliver Seth,
Honorable Robert H. McWilliams,
Honorable James E. Barrett,
Honorable William E. Doyle,
Honorable Monroe G. McKay,
Honorable James K. Logan,
and
Honorable Stephanie K. Seymour,

Circuit Judges.

This matter comes on for consideration of plaintiffs' petition for rehearing and suggestion for rehearing in banc in the captioned appeals.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the cases were argued and submitted.

The petition for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Judge Holloway did not participate.

/s/ HOWARD K. PHILLIPS

HOWARD K. PHILLIPS,
Clerk

APPENDIX D
Fed. R. Evid. 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

APPENDIX E
Fed. R. Evid. 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

APPENDIX F
Fed. R. Evid. 407

Rule 407. Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur; evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

APPENDIX G
Fed. R. Civ. P. 42

Rule 42. Consolidation; Separate Trials

(a) **Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) **Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

APPENDIX H
Fed. R. Civ. P. 46

Rule 46. Exceptions Unnecessary

Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

APPENDIX I
Fed. R. Civ. P. 51

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

APPENDIX J
49 U.S.C. § 1441(e)

(e) Use of records and reports as evidence.

No part of any report or reports of the Board [National Transportation Safety Board] relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

APPENDIX K
49 C.F.R. § 835.3

§ 835.3 Scope of permissible testimony.

(a) Section 701(e) of the FA Act and section 304(c) of the Safety Act preclude the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. The purpose of these sections would be defeated if expert opinion testimony of Board employees, which is reflected in the ultimate views of the Board expressed in its report concerning the cause of an accident, were admitted in evidence or used in private litigation arising out of an accident. The Board relies heavily upon its investigators' opinions in determining the cause or probable cause of an accident, and the investigators' opinions thus become inextricably entwined in the Board's determination. Furthermore, the use of Board employees as experts to give opinion testimony would impose a serious administrative burden on the Board's investigative staff. Litigants should obtain their expert witnesses from other sources.

(b) Consistent with paragraph (a) of this section, Board employees may testify as to the factual information they obtained during the course of the accident investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation, or to give opinion testimony concerning the cause of the accident.

APPENDIX L

(Exhibit 19)
"Service Newsflash"
Number: 16
Date: March 1st, 1978
ATA 22 - Autopilot, Failure to Disengage

SERVICE NEWSFLASH

NUMBER : 16

DATE : March 1st, 1978

ATA 22 - AUTOPILOT, FAILURE TO DISENGAGE

In the Autopilot engaged configuration, the autopilot may fail to disengage when the pilot presses the switch on the control wheel.

An Autopilot disengagement controlled by the switch on the control wheel is indicated by a light located on instrument panel and by the position of the engage lever on the Autopilot control unit located in the pedestal.

It is very important to check actual disengagement of the Autopilot, using these means.

A refusal of the Autopilot to disengage, not perceived by the pilot, constitutes an insidious failure which may result in a situation similar to the situation resulting from an Horizontal Stabilizer trim runaway. Under the action of the Automatical Trim, the Horizontal Stabilizer moves in a direction opposed to that commanded by the pilot. Such a motion is identified by a slow sounding of the clacker.

Since such a motion can be stopped by the Horizontal Stabilizer normal control, only if the counteraction is maintained, it is advisable to :

1) Rapidly use the emergency Horizontal Stabilizer trim control. Only this action can definitively stop such an Horizontal Stabilizer motion.

2) Set to "DISENGAGED" the Autopilot control unit lever on the pedestal, and, if necessary, pull out the "AUTO-PILOT" circuit breakers.

3) Push in the normal Horizontal Stabilizer circuit breaker.

A possible reason for the Autopilot failing to disengage is a binding of the Autopilot disengage switch (COLLINS AP 105 Autopilot).

The recommendations of COLLINS SERVICE INFORMATION LETTER 614E-5A SIL 1-77, reminded in AMD-BA Newsletter No 16, are aimed at eliminating this potential failure. You are requested to comply with these recommendations at your earliest convenience.

Attachment : Collins Service Information Letter 614E-5A SIL 1-77 Sep. 30/77.

AVIONS MARCEL DASSAULT - BREGUET AVIATION
92 - SAINT-CLOUD - FRANCE

COLLINS SERVICE INFORMATION LETTER

Collins Avionics Division/Rockwell International

614E-5A AUTOPILOT CONTROLLER (792-6348-XXX)
SWITCH ASSEMBLY (797-7472-001) AND SOLENOID (411-0127-010)
(P/O AP-105 AUTOPILOT SYSTEM)

SERVICE INFORMATION LETTER 1-77

TO PREVENT BINDING OF AUTOPILOT DISENGAGE SWITCH

Binding of this switch assembly has been experienced in the field making it difficult to disengage the autopilot. Investigation of failed units has determined that excess friction is the cause. If this problem is encountered, or if a unit is returned for repair, overhaul, or modification, the following lubrication procedure is recommended:

NOTE: The figure/item numbers referred to in the following steps are referenced from the 614E-5A overhaul manual, Collins part number 523-0762796, illustrated parts list.

1. Replace bushings and pins (797-6513-001 and 797-6517-001), items 9 and 10 in Figure 4.

2. Disassemble according to overhaul manual procedures and lubricate plungers of solenoids (411-0127-010), items 13 and 14, with dry graphite film (005-0337-000), (Miracle Power Products Corp. part number, DGF-123).

3. Lubricate ramp surfaces of lever and arm (609-3977-001 and 609-3978-001), items 21 and 22, with the above graphite.

This switch assembly has been modified to add this new lubrication to all manufactured and stocked units. Production cut-in is as follows:

COLLINS PART NO.	SERIAL NO.
792-6348-001	1644
792-6348-002	1979
792-6348-003	1822
792-6348-004	2049
792-6348-005	2073

APPENDIX M
Status Conference, May 8, 1981

However, we note that since the decision of Good, the Colorado legislature did modify the implications of that rule and passage of CRS 1973, Section 13-21-404. See also 6 Colo. Lawyer 2123, and also Page 2127-28, December, 1977.

We are not convinced that Good will be decided the same way under the present statute, and this indicates to us the state policies involved do not necessarily conflict with the approach taken in federal courts.

We also reviewed the decisions in the Eighth Circuit which have held a ban on subsequent remedial measures was not subsequently applicable in products liability cases, Robbins vs. Farmers Union Grain Terminal Association, 552 F.2d 788, Eighth Circuit, 1977, and Farner vs. Paccar, P-a-c-c-a-r, 562 F.2d 518, in like manner an Eighth Circuit case, 1977.

However, we decline to accept the reasoning of those cases in this action. While there might be a situation where application of Rule 407 may be inapplicable to the products liability, we are of the view that several other factors mitigate against such a holding in this case.

Evidence of subsequent remedial measures would be confusing to the jury and prejudicial under Rule 403. The relevancy and probative value of the subsequent measures taken in this action are low, Rule 401.

APPENDIX N

Appellee-Defendant AMD Reply Brief (pp. 26-27)

Plaintiffs assign as error the court's refusal to admit Plaintiffs' Exhibit 19, "Service Newsflash 16" issued by Dassault on March 1, 1978, (Record, Vol. 80, Exhibit 19), as evidence of the *need for a warning* regarding failure of the autopilot on a Falcon 10 aircraft to disengage. The obvious purpose of plaintiffs' offer of Exhibit 19 was to attempt to show that if this post-accident warning had been issued prior to April 3, 1977, the accident would have been less likely to occur, and to prove negligence or culpable conduct of the manufacturer, Dassault, and the seller, Falcon Jet Corporation. Feasibility of such warning prior to the accident was not controverted.

* * *

APPENDIX O
Status Conference, May 8, 1981

As to both strict liability and negligence claims the Court will admit Exhibits 19, 20 and 47 only when offered for another purpose, if that issue is present in this case such as proving ownership, control or feasibility of precautionary measures if controverted. And I underscore if controverted or for impeachment.

If there is a stipulation as to the feasibility of precautionary measures, then the applicability of Rule 407 seriously affects the admissibility of any changes.

We underscore the word "if controverted". And Rule 407 starts out with a prohibition. The Court recognizes it mentions negligence, and the Court at times throughout the country include the strict liability in evidence the phrase "negligence" and in other cases they have not.

However, in our case we have both a cause of action based on negligence and strict liability. So we are satisfied that the rule adopted by us is properly dictated in this case.

The Court will apply the same rule on objections made to Exhibits 41, 42, 43, 80 and 93 insofar as they may be shown to contain evidence of subsequent remedial measures.

Item Number C, evidence of other incidents under Rule 401, 402 and 403. Objections to evidence of other incidents based on Rules 401, 402, 403, these have been interposed by the Defendants to Plaintiffs' Exhibit Numbers 37, 46, 49, 50, 52, 61-67, 73, 74, 77, 80, 89 and 102.

APPENDIX P
Colorado Jury Instructions — Civ. 2d 14:1 (1980)

14:1 Manufacturer's Liability Based on Negligence — Elements of Liability

In order for the plaintiff, *(name)*, to recover from the defendant, *(name)*, on his claim of negligence, you must find all of the following have been proved:

1. The defendant manufactured the *(insert description of article)*;

2. The defendant was negligent in manufacturing the *(description of article)* in that he failed to exercise reasonable care to prevent the *(description of article)* from creating an unreasonable risk of harm to the person or property of one who might reasonably be expected to use, consume or be affected by the *(description of article)* while it was being used in the manner the defendant might reasonably have expected;

3. The plaintiff was one of those persons the defendant should reasonably have expected to use, consume or be affected by the *(description of article)*; and

4. The plaintiff incurred (injuries) (damages) (losses) which were caused by the defendant's negligence, while the *(description of article)* was being used in a manner the defendant should reasonably have expected.

If you find that any one or more of these *(number)* propositions has not been proved by a preponderance of the evidence, then your verdict (on this claim) must be for the defendant.

On the other hand, if you find that all of these *(number)* propositions have been proved by a preponderance of the evidence, then your verdict (on this claim) must be for the plaintiff (unless you should also find that the defendant's affirmative defense of *[insert any affirmative defense other than contributory negligence]* has been proved by a preponderance of the evidence, in which event your verdict must be for the defendant).

Notes on Use

Omit any numbered paragraphs, the facts of which are not in dispute.

Use whichever parenthesized words are most appropriate and omit the parenthesized clause of the last paragraph if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

* * *

APPENDIX Q
Trial Transcript
(Tender of Plaintiffs' Instructions)

THE COURT: Let me try to keep the instructions straight. Do you have any?

MR. TRUHLAR: Yes, Your Honor, we have an original and one copy of plaintiffs' proposed instructions. They were shared with defendants. We have not secured agreement on any of those. The ones plaintiffs have agreed on with defendants were in the batch that Mr. Lawrence just tendered.

THE COURT: I understand that counsel will be meeting tonight or tomorrow also to continue to work and narrow the difference of opinion in regard to instructions; is that correct, please?

MR. TRUHLAR: That's correct, Your Honor.

MR. LAWRENCE: That's correct, Your Honor.

MR. SYLLING: Defense counsel plan on meeting this evening, Judge, and then all tomorrow. We thought that would facilitate matters.

Defense counsel met tonight because we think we can get a lot of them agreed to.

THE COURT: I would care to have counsel's best thinking on their instructions by five o'clock tomorrow night. Does that present problems?

APPENDIX R
Plaintiffs' Proposed Instruction No. 3

In order for the plaintiffs to recover from one or more of the defendants on their claim of negligence, you must find all of the following have been proved:

1. The defendant was negligent in manufacturing or selling the Falcon 10 aircraft and/or its engines in that it failed to exercise reasonable care to prevent the Falcon 10 aircraft and/or its engines from creating an unreasonable risk of harm to the person or property of one who might reasonably be expected to use or be affected by the Falcon 10 aircraft and/or its engines while it was being used in the manner the defendant might reasonably have expected;

2. The plaintiffs were among those persons the defendant should reasonably have expected to use or be affected by the Falcon 10 aircraft and/or its engines; and

3. The plaintiffs incurred injuries, damages, or losses which were caused by the defendant's negligence, while the Falcon 10 aircraft and/or its engines were being used in a manner the defendant should reasonably have expected.

If you find that any one or more of these three propositions has not been proved by a preponderance of the evidence, then your verdict on this claim must be for the defendants.

On the other hand, if you find that all of these three propositions have been proved by a preponderance of the evidence, then your verdict on this claim must be for the plaintiffs.

APPENDIX S
Trial Transcript
(Re-tender of Instructions)

MR. RAU: Yes, Your Honor. We have checked the sample.

THE COURT: Mr. Sylling?

MR. SYLLING: Yes, Your Honor.

MR. LAWRENCE: Yes, Your Honor.

MR. COYLE: I believe so, Your Honor. I was the person who submitted — who put this Instruction 49 in the folders. I wasn't able to determine if it was in all the folders.

THE COURT: To my knowledge it is, counsel.

MR. COYLE: Thank you, Your Honor.

THE COURT: That is the only one that was a latecomer, but also my secretary apparently did correct and put in the new Verdict Form B with the verbiage that had to be corrected in three particulars.

The Court would ask you, Mr. Rau, Mr. Ullstrom, if you care to make any other objections — no afterthoughts — but any other objections to the Court's instructions, or the Court will consider you retendering all instructions that you tendered before and embodied in your tender at this time your comments before, is that your position, please?

MR. RAU: May I have one second, please?

THE COURT: Please.

MR. RAU: No, Your Honor, no further objections.

THE COURT: The record will so reflect the retendering of all the instructions tendered before, the verdict forms

APPENDIX T
Trial Transcript
(Plaintiffs' Objections to Instructions)

27-A already I am inserting by interlineation something in 27-A. However, after the second paragraph "The accident was caused by the negligence of Dassault." I am inserting "while the aircraft was being used in the manner Dassault should reasonably have expected."

The Court will note the objections of plaintiffs' counsel. The objection will be noted. It will be overruled, please. I believe that this is going to be clearer for the jury and the case law seems to support the utilization of the instruction in this way.

In like manner, in 29, Paragraph 3, while the aircraft was being used in the manner Garrett should reasonably have expected. It's the same principle.

Again, 3, while the aircraft was being used in the manner Garret should reasonably have expected.

The Court will note the objection of plaintiffs' counsel to 29 by this interlineation. It will be noted and overruled.

30, we will use 30 the way it is without the strikeouts. Paragraph 2, the accident was caused by defendant Garrett's negligence while the aircraft was being used in the manner in which defendant Garrett should reasonably have expected. That should be kept in.

APPENDIX U
Trial Transcript
(Admission of NTSB Testimony)

PROCEEDINGS

MR. GERRARD: Your Honor, one thing we have to do before we start with Pinkel, we have to get the tailpipe off.

THE COURT: We are going to start right now with the deposition.

The record should reflect the presence of the twelve jurors, the attorneys of record. The next witness, please.

MR. KAHN: James H. Lewis, Your Honor, by deposition.

THE COURT: Ladies and gentlemen, the next witness to be called will be James H. Lewis, and his testimony will be presented by way of deposition. Do you understand that, ladies and gentlemen, please?

MR. GERRARD: Your Honor, before we start could we explain to the jury Mr. Lewis was the head of the power plant group during the NTSB investigation. He is the man who looked into the engine characteristics and supervised the tear-down.

THE COURT: Do you understand that, please? He is an employee of the government agency. The NTSB. We have had depositions of other parties from that government agency before, please.

Let's go ahead, please.

MR. LAWRENCE: Thank you, Your Honor.

MR. TRUHLAR: Your Honor, prior to this deposition we would object to opinion testimony in the deposition that's in defendants' designations at three points in the deposition that go to the probable cause.

THE COURT: What pages are we talking about, please?

MR. TRUHLAR: We object to the answers on Page 19, Lines 1 and 2, Page 82, Lines 5 to 8, and continued at Line 16 to 18 on that page. Page 84, Line 16 and 19. Those are answers to a question that was on Page 83, Lines 8 and 9.

THE COURT: Is it because of his background that you are objecting?

MR. TRUHLAR: Because he is an NTSB member, and this is inadmissible under 49 USC Section 1441(e), and *Keen* v. *Detroit Diesel Allison*.

THE COURT: That's the citation I gave you earlier; is that correct, please?

MR. TRUHLAR: Yes, Your Honor.

THE COURT: What's your position, Mr. Lawrence?

MR. LAWRENCE: Well, the position of Dassault is that it is only the ultimate conclusion of the NTSB as to probable cause that is rendered inadmissible by that statute, and I would have to look at the specific references in here that plaintiffs' counsel has just cited, but I don't believe that the supposed opinions referred to go to the ultimate issue of probable cause of the accident as prohibited by that particular section of Title 49.

APPENDIX V
Deposition of James Lewis, NTSB Investigator

A We found that there was no indication that the engines had been contributory to the accident.

MR. ULLSTROM: I am afraid I would have to move to strike as not responsive.

MR. GERRARD: I think he answered the question you asked, counsel.

MR. CORRIGAN: Could I have the answer read again?

THE WITNESS: There was no indication, in my obeservations at Denver —

MR. ROLEF: I am going to instruct him not to say anything. If you want it read back, that is fine.

MR. CORRIGAN: That is where I wanted it read from, the record.

MR. ROLEF: Not to give any responses to the cause of the accident, which I think that response does.

(The pertinent portion of the record, as recorded, was read by the reporter.)

BY MR. ULLSTROM:

Q My question, sir, was in relation to D-2, of page two. What I asked you is, what examination did you do at Denver?

APPENDIX W
Trial Transcript
(NTSB Testimony Read to Jury)

"A Yes, sir. The left, serial number of the left engine was P-73127C. The right engine serial number was P-73128C.

"Q What type engines were these, sir?

"A They were TFE-731-21C.

"Q Did you determine approximately how many hours, or cycles each engine had on it, and if so, would you recite it?

"A The total time of the left engine was about 1,394 hours; that of the right engine, 1,466 hours. The number of cycles was 1,429, for the left engine, and 1,239 for the right.

"Q And your examination at Denver, as distinct from Phoenix, would you tell us what conclusions to what you found there?

"A At the site?

"Q Yes, at Denver, I have reference to D-2, Page 2.

"A We found that there was no indication that the engines had been contributory to the accident.

"Q My question, sir, was in relation to D-2, of Page 2. What I asked you is, what examination did you do at Denver?

"A Well, that was the summation statement I just gave. I thought it should cover that, and what I

previously said as to the extent, the results of the examination at Denver."

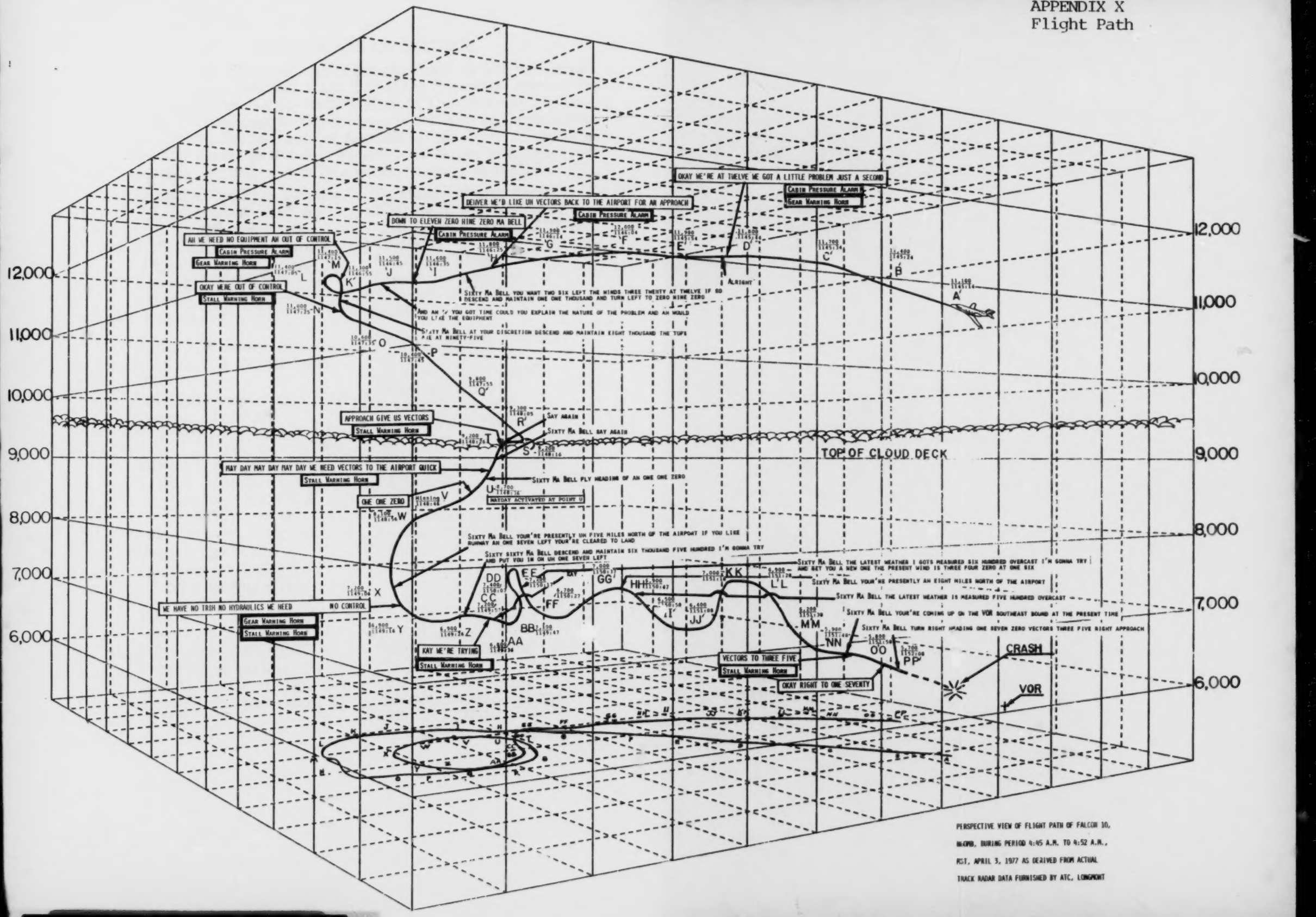
MR. LAWRENCE: Page 21, Line 10.

"Q Do you recall the condition of the engines, when you first saw them, sir, at the site?

"A Each one was lying on the ground, and each one had

* * *

APPENDIX X
Flight Path



PERSPECTIVE VIEW OF FLIGHT PATH OF FALCON 10, N40MB, DURING PERIOD 4:45 A.M. TO 4:52 A.M., MST, APRIL 3, 1977 AS DERIVED FROM ACTUAL TRACK RADAR DATA FURNISHED BY ATC, LONGMONT

CERTIFICATE OF SERVICE

I, L. B. Ullstrom, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1984, I served copies of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, by mailing copies in a duly addressed envelope, with first class postage prepaid, to the following attorneys of record:

Ronald O. Sylling, Esquire
TILLY & GRAVES
#701 Ptarmigan Place
3773 Cherry Creek North Drive
Denver, CO 80209
Attorney for Defendant Falcon Jet

Philip E. Lowery, Esquire
LOWERY & WOODROW, P.C.
110-16th Street, Suite 1410
Denver, CO 80202
Attorney for Plaintiff Miles

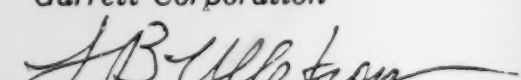
Edwin S. Kahn, Esquire
KELLY, HAGLUND, GARNSEY, KAHN & DONNELL
1441-18th St., Suite 300
Denver, CO 80202
Attorney for Defendant Garrett Corporation

Matthew J. Corrigan, Esquire
MENDES & MOUNT
Three Park Avenue
New York, NY 10016
Attorney for Defendant AMD

W. Robert Ward, Esquire
WELLER, FRIEDRICH, HICKISCH, HAZLITT & WARD
P. O. Box 6178
Denver, CO 80206
Attorney for Defendant AMD

Myles J. Dolan, Esquire
LAW OFFICES OF MYLES J. DOLAN
5805 Carr Street
Arvada, CO 80004
Attorney for Plaintiff Whistler

Keith Gerrard, Esquire
PERKINS, COIE, STONE, OLSEN & WILLIAMS
1900 Washington Building
Seattle, WA 98101
Attorney for Defendant Garrett Corporation



L. B. Ullstrom,
Law Offices of L. B. Ullstrom
601 Broadway, Suite 400
Denver, Colorado 80203
(303) 292-3800
Attorneys for Petitioners

AFFIDAVIT OF MAILING

I, L. B. Ullstrom, one of the attorneys for the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1984, I deposited in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

L. B. Ullstrom
601 Broadway, Suite 400
Denver, CO 80203
Telephone: 303/292-3880
Attorney for Petitioners

STATE OF COLORADO

ss.

CITY AND COUNTY OF DENVER

SUBSCRIBED AND SWORN to before me at Denver, Colorado this 29th day of June, 1984.

NOTARY PUBLIC - State of Colorado 601 Broadway Denver CO

My commission expires:
3-25-88